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Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment

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NOTE

Section Five Overbreadth: The Facial Approach to Adjudicating Challenges Under Section Five of the Fourteenth Amendment

Catherine Carroll

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INTRODUCTION

In February 1996, the New York State Department of Transportation fired Joseph Kilcullen from his position as a snowplow driver in the Department's Highway Maintenance training program.¹ Alleging that the state discharged him because of his epilepsy and learning disability,² Kilcullen sued his former employer under the Americans with Disabilities Act ("ADA"),³ which abrogated states' sovereign immunity and permitted private suits for damages against states in federal court.⁴ Kilcullen asserted only that he was not treated

1. Kilcullen v. New York State Dep't of Transp., 33 F. Supp. 2d 133, 136 (N.D.N.Y. 1999).

2. *Id.*

3. 42 U.S.C. §§ 12101-12213 (1994).

4. Kilcullen, 33 F. Supp. 2d at 137 (citing 42 U.S.C. § 12202 (1994)). Subsequent to Kilcullen, the Supreme Court struck down the provisions of the ADA permitting suits

the same as similarly situated non-disabled employees; his claim did not implicate the ADA's requirement that employers provide "reasonable accommodation" to disabled employees.⁵ Nevertheless, the federal district court for the Northern District of New York concluded that to determine the validity of the ADA's abrogation of state sovereign immunity in Kilcullen's case, it had to consider whether the ADA as a whole — including the reasonable accommodation provisions — was a valid exercise of Congress's power under section 5 of the Fourteenth Amendment.⁶

By discussing the propriety of a facial analysis of the ADA's abrogation of sovereign immunity, the district court in *Kilcullen v. New York State Department of Transportation*⁷ addressed an important procedural issue that the Supreme Court has failed to acknowledge in any of its section 5 cases since *City of Boerne v. Flores*.⁸ The Court's silence on this point does not indicate inaction; in its recent cases, the Court has tacitly applied a new approach to adjudicating challenges to legislation enacted pursuant to Congress's power under section 5 of the Fourteenth Amendment. This new approach not only permits facial challenges where previously they have been disfavored, but also assesses those challenges under a test that replaces the traditional standard with a version of overbreadth analysis typically reserved to the First Amendment context.⁹

against state employers as exceeding Congress's power under section 5 of the Fourteenth Amendment. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

5. *Kilcullen*, 33 F. Supp. 2d at 144.

6. See *id.* Under *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), Congress may abrogate states' immunity from suit for damages in federal court only when acting pursuant to section 5 of the Fourteenth Amendment, which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Such an abrogation is appropriate enforcement legislation only if it provides a congruent and proportional remedy to state violations of the Fourteenth Amendment. *Garrett*, 531 U.S. at 365; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81-82 (2000); *Florida Prepaid Post-secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637-39 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 517-20 (1997). In *Kilcullen*, for example, the state argued that the ADA did not validly abrogate its sovereign immunity and that the plaintiffs' claims were therefore barred. 33 F. Supp. 2d at 136. In analyzing this claim, the court considered whether the ADA was "a congruent and proportional response" to violations of the Equal Protection Clause, or, instead, whether it exceeded Congress's power under section 5 of the Fourteenth Amendment. *Id.* at 139-40. The *Kilcullen* court acknowledged that the facts of the case before it did not involve the ADA's reasonable accommodation requirements. *Id.* at 144. The court found, however, that the ADA's anti-discrimination provisions and the reasonable accommodation requirement were both incorporated into the statutory definitions of "qualified individual with a disability" and "discriminate." *Id.* Accordingly, "the aspect on which [the plaintiff rested] his claim ha[d] no separate textual manifestation from the accommodation requirement." *Id.* The constitutional validity of the antidiscrimination provision therefore depended on the validity of the reasonable accommodation requirement. *Id.*

7. 33 F. Supp. 2d 133 (N.D.N.Y. 1999).

8. 521 U.S. 507 (1997).

9. Arguably, this new approach characterizes the Court's recent decisions analyzing legislation under the Commerce Clause as well. See, e.g., *United States v. Morrison*, 529 U.S.

Traditionally, constitutional adjudication in the federal courts proceeds through "as-applied" challenges, in which litigants challenge a statute as it applies to their own conduct in their particular cases.¹⁰ In general, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."¹¹ The primacy of as-applied challenges reflects the principle that the judicial power to invalidate legislative acts is properly exercised only in concrete cases and controversies.¹²

Occasionally, "weighty countervailing policies" have persuaded the Court to entertain "facial" challenges, in which a party raises constitutional objections to the terms of the statute itself — without regard to the precise circumstances of his particular case — even if the statute validly would apply to the particular party in the absence of the challenged provisions.¹³ The prototypical example is a First

598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). This Note focuses only on federal legislation passed pursuant to section 5 of the Fourteenth Amendment.

10. See generally HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 195-213 (Richard H. Fallon, Jr. et al. eds., 4th ed. 1996) [hereinafter HART & WECHSLER]; Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1386-87 (2000); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000); Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 360 (1998); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 277 (1984).

11. *United States v. Raines*, 362 U.S. 17, 21-26 (1960) (declining to consider whether the potential applicability of the Civil Rights Act of 1957 to private actors violated the state action requirement of the Fifteenth Amendment where the actual defendants were state officials); *accord Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912) ("[T]his court must deal with the case in hand and not with imaginary ones.").

12. See *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973) ("Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court. . . ." (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803))); see also *New York v. Ferber*, 458 U.S. 747, 767-68 (1982); *Raines*, 362 U.S. at 20-22; HART & WECHSLER, *supra* note 10, at 197; Fallon, *supra* note 10, at 1330; Isserles, *supra* note 10, at 361, 366, 454-55. For a discussion of how the Court's approach to adjudicating section 5 cases conflicts with the proper scope of judicial review, see *infra* Section II.A.

13. *Raines*, 362 U.S. at 22. Some commentators have argued that distinguishing between as-applied and facial challenges creates a false dichotomy between these modes of adjudication. Professor Fallon has argued, for example, that there are no distinct categories of facial or as-applied challenges. Fallon, *supra* note 10, at 1336-38. Rather, in Fallon's view, every litigant must assert that a statute is invalid in his case, and a determination that a statute is facially or partly invalid is simply a consequence of the relevant constitutional test. *Id.* In response, Professor Adler contends that all challenges are facial challenges because all constitutional rights are rights against rules, and the role of a court is to measure a rule of law — on its face — against the appropriate constitutional test. Adler, *supra* note 10, at 1386-88. Taking a different tack, Isserles asserts that the traditional distinction between facial and as-applied challenges actually masks variations within the category of facial challenges. Isserles, *supra* note 10, at 363-64. Facial challenges, according to Isserles, may be either

Amendment overbreadth challenge, in which a party to whom a statute constitutionally applies may nevertheless challenge the statute on the ground that in other circumstances it may reach a substantial amount of protected First Amendment expression.¹⁴ Outside the First Amendment context, however, the Court has generally disfavored facial challenges,¹⁵ holding that such challenges may succeed only when “no set of circumstances exists under which the [a]ct would be valid.”¹⁶

“overbreadth” challenges, which predicate facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule, or “valid rule” challenges, which argue that a constitutional defect inheres in the terms of the statute itself, independent of any particular application. *Id.* This Note does not attempt to engage these disputes over the correctness of the distinction between facial and as-applied challenges, insofar as courts continue in practice to operate on the basis of this distinction. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Rust v. Sullivan*, 500 U.S. 173 (1991); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *United States v. Salerno*, 481 U.S. 739 (1987). Nevertheless, the Court’s new approach to adjudicating the validity of legislation under section 5 of the Fourteenth Amendment, as described in this Note, raises a number of interesting implications for this debate.

14. See *Ferber*, 458 U.S. at 769-70; *Broadrick*, 413 U.S. at 610-15; see also *Dorf*, *supra* note 10, at 261-78. Third-party standing also constitutes an exception to the as-applied regime in situations where the Court’s prudential rules render such standing appropriate. See *HART & WECHSLER*, *supra* note 10, at 187-95; *Monaghan*, *supra* note 10, at 278. For discussions of the role that overbreadth analysis and third-party standing, as well as the rules of statutory severability, play in resolving conflicts between the as-applied regime and the rule that every person has a right to be judged by a valid rule of law — what Professor Monaghan has called the “valid rule requirement,” — see *Dorf*, *supra* note 10, at 242-49; *Fallon*, *supra* note 10, at 1331; *Isserles*, *supra* note 10, at 368-71, 388-91; and *Monaghan*, *supra* note 10, at 282.

15. See *FW/PBS*, 493 U.S. at 223; *Salerno*, 481 U.S. at 745 (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”). Even in the First Amendment context, the Court has proceeded with caution in permitting parties to raise overbreadth challenges. See *Ferber*, 458 U.S. at 769-70; *Parker v. Levy*, 417 U.S. 733, 760 (1974) (noting that even in the First Amendment context, the Court has “repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied”); *Broadrick*, 413 U.S. at 613 (noting that overbreadth doctrine is “strong medicine” that the Court applies “sparingly and only as a last resort”). Professor Dorf has argued that although the Court has purported to disfavor facial challenges, it has in fact adopted this approach in numerous areas. See *Dorf*, *supra* note 10, at 236, 251-81. Dorf and others point to rules against underinclusive or discriminatory statutes and rules against suspect classifications or impermissible purpose as examples of constitutional standards that measure a statute on its face. See *id.*; see also *Isserles*, *supra* note 10, at 440-46. As Professor Fallon has suggested, see *Fallon*, *supra* note 10, at 1336, and as this Note will elaborate, the Court’s new test for appropriate section 5 legislation constitutes yet another departure from the general rule that overbreadth challenges are not permissible outside the First Amendment context. See *infra* Section I.A.

16. *Salerno*, 481 U.S. at 745; see also *Adler*, *supra* note 10, at 1389 n.62 (citing cases reaffirming the *Salerno* standard). The *Salerno* standard for facial challenges outside the First Amendment overbreadth context has drawn much criticism, both for its severity and for its accuracy as a statement of the standard governing facial challenges. See, e.g., *Morales*, 527 U.S. at 55 n.22 (opinion of Stevens, J.); *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring); *Adler*, *supra* note 10, at 1389-90 (noting that the Court has sustained facial challenges even when there seemed to be some constitutional applications and the First Amendment was not implicated); *Dorf*, *supra* note 10, at 236 (arguing that *Salerno* does not accurately characterize the standard for facial challenges in many cases); *Isserles*, *supra* note 10, at 372-75, 456-63 (summarizing common criticisms of *Salerno*’s

In *City of Boerne v. Flores*,¹⁷ the Supreme Court adopted a new test for the validity of federal legislation enacted under Congress's power to enforce the Fourteenth Amendment.¹⁸ Recognizing that Congress's enforcement power is limited to remedying or preventing violations of the Fourteenth Amendment, the Court has required that legislation enacted pursuant to section 5 of the Fourteenth Amendment exhibit a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹⁹

Apart from this heightened scrutiny of ends and means, the Court's recent section 5 cases have entailed another important innovation. The Court in these cases has departed from the traditional "as-applied" method of adjudication in favor of a facial overbreadth approach. Instead of considering legislation in light of the particular facts and claims of a given case, the Court has examined the challenged statutes on their faces. Instead of asking whether *any* set of circumstances exists in which the challenged statutes might appropriately enforce the Fourteenth Amendment against unconstitutional state action, the Court has asked whether *many* of the state acts affected by these statutes have a significant likelihood of being unconstitutional. Moreover, the Court has adopted this approach without any discussion of its merits or drawbacks.²⁰ The issue has also largely escaped academic discussion.²¹

severity and noting that many of the Court's cases considering regulations of abortion depart from the *Salerno* standard); Rachel D. King, Comment, *A Back Door Solution: Stenberg v. Carhart and the Answer to the Casey/Salerno Dilemma for Facial Challenges to Abortion Statutes*, 50 EMORY L.J. 873 (2001) (arguing that Planned Parenthood v. Casey, 505 U.S. 833 (1992), replaced *Salerno* as the standard for evaluating facial challenges in cases involving regulations of abortion). Justice Scalia, noting the inherent tension between facial invalidation and the proper scope of judicial review, has defended *Salerno* as the proper standard for evaluating a facial challenge and has demonstrated that federal courts generally continue to apply *Salerno* in facial-challenge cases. See *Morales*, 527 U.S. at 77-80 (Scalia, J., dissenting). Isserles has also defended *Salerno*, arguing that the common critique of *Salerno* is based on the incorrect assumption that *Salerno* is the standard for "overbreadth" facial challenges. See Isserles, *supra* note 10, at 375-82. According to Isserles, *Salerno* accurately describes a "valid rule" facial challenge, in which a constitutional defect inheres in the terms of a statute itself, such that the statute in fact has no valid applications. See *id.* Regardless of whether the language of *Salerno* is taken literally or understood as Isserles has interpreted it, this Note will argue that the Court's recent section 5 cases have invalidated statutes on their face even where the *Salerno* standard was not met. See *infra* Section I.A.

17. 521 U.S. 507 (1997).

18. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5; see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

19. *City of Boerne*, 521 U.S. at 520.

20. Justice Stevens made the only comments on this issue in any section 5 case since *City of Boerne*. See *Florida Prepaid*, 527 U.S. at 653-64 (Stevens, J., dissenting) (arguing that be-

Despite the Court's failure to acknowledge or defend this new approach, the choice between facial overbreadth and as-applied analysis — like any procedural decision²² — promises to be of great importance in future section 5 cases. In particular, the success of any challenge to the validity of the abrogation of immunity in Title VII of the Civil Rights Act of 1964 may likely depend on the method of adjudication.²³

cause the plaintiffs alleged a willful — not negligent — patent infringement, the Court should consider only whether the Patent Remedy Act validly abrogated state sovereign immunity in cases of willful — not negligent — patent infringement, and complaining that “the Court’s . . . negative answer to that question has nothing to do with the facts of this case”).

21. Although the Court's recent section 5 cases have generated a great deal of scholarly commentary, most of this commentary, like the Court's opinions, has ignored the application of a facial analysis. *But see* Fallon, *supra* note 10, at 1336, 1356-58 (discussing *Florida Prepaid* as a possible departure from the traditional rules of facial versus as-applied adjudication).

22. Professor Dorf points out, for example, that disagreements on the outcomes of many abortion cases have often boiled down to disagreements over whether the *Salerno* standard should apply. *See* Dorf, *supra* note 10, at 236-37 (citing *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011 (1992)). More broadly, the method of adjudication or theory of jurisprudence a judge brings to a case can dramatically influence how a judge evaluates a law or resolves a legal dispute. A canonical example is the contrasting opinions of Justices Chase and Iredell in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), where the Justices considered the circumstances under which a court ought to invalidate an act of the legislature. Justice Chase espoused a natural-law theory and concluded that a legislative act “contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority,” *id.* at 388, while Justice Iredell adopted a more positivist methodology and asserted that a court cannot determine the validity of a legislative act by referring to “principles of natural justice.” *Id.* at 399. For both Justices, the substantive outcome — judicial invalidation of a legislative act — was determined in part by the prior methodological choice of whether to take principles of natural law into account. *See also* PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (examining alternative methods of constitutional argument and adjudication); HENRY HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 694-95 (William Eskridge & Philip Frickey eds., 1994) (arguing that the wisdom of substantive decisions depends on the soundness of the chosen procedure).

23. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000), prohibits discrimination by employers on the basis of race, color, religion, sex, and national origin. In 1972, Title VII was amended to include “governments,” “governmental agencies,” and “political subdivisions” within the definition of employers covered by the Act. Equal Opportunity Employment Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103. The Supreme Court held in *Fitzpatrick v. Bitzer* that these amendments abrogated state sovereign immunity. 427 U.S. 445, 449 n.2, 452-53 (1976). The parties in *Fitzpatrick* did not dispute that the 1972 amendments were a valid exercise of Congress's power under section 5 of the Fourteenth Amendment, so the issue technically remains an open question. *See id.* at 456 n.11. In the wake of *City of Boerne* and subsequent section 5 cases, new challenges to the validity of the abrogation of sovereign immunity in Title VII have begun to make their way through the lower courts. Some courts have rested on *Fitzpatrick* and upheld the abrogation, reasoning that even if subsequent cases have undermined *Fitzpatrick*, the case remains binding on the lower courts until the Supreme Court overrules it. *See, e.g.,* *Holman v. Indiana*, 211 F.3d 399, 402 n.2 (7th Cir. 2000); *Nanda v. Bd. of Trs. of the Univ. of Ill.*, 219 F. Supp. 2d 911, 913-14 (N.D. Ill. 2001); *Okokuro v. Pennsylvania Dep't of Welfare*, No. 00-2044, 2000 U.S. Dist. LEXIS 15699, at *9-11 (E.D. Pa. Oct. 31, 2000). Other courts have acknowledged *Fitzpatrick* but have proceeded to analyze the Title VII question anew under the Court's more recent section 5 decisions. *See, e.g.,* *Okruhlik v. Univ. of Ark.*, 255 F.3d 615, 624-27 (8th Cir. 2001) (upholding the disparate treatment and disparate impact provi-

To constitute a valid exercise of Congress's power under section 5, the abrogation of immunity in Title VII must provide a congruent and proportional remedy to state violations of the Equal Protection Clause.²⁴ Title VII's prohibition of intentional racial discrimination by state employers closely mirrors that clause.²⁵ The abrogation of sovereign immunity for intentional discrimination — in isolation from other provisions of the Act — certainly passes the standards of *City of Boerne* and its progeny.²⁶ Under the new section 5 overbreadth approach, however, any state defendant in a Title VII suit could argue that the validity of this abrogation depends on the validity of Title VII's disparate impact provisions,²⁷ even in suits alleging only intentional discrimination. As the Fourteenth Amendment itself does not prohibit state action that produces an unintentional discriminatory effect, these provisions are much less likely to satisfy the Court's test for appropriate section 5 legislation.²⁸ Thus, if the Court chooses to

sions of Title VII as valid section 5 legislation); *In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1319-24 (11th Cir. 1999) (holding that the disparate impact provisions of Title VII are a valid exercise of Congress's section 5 power). For a discussion of how the Court's new approach to adjudicating challenges under section 5 may affect the outcome of a challenge to Title VII, see *infra* Part III.

24. See *supra* note 6.

25. The Equal Protection Clause of the Fourteenth Amendment prohibits all intentional racial discrimination by states that cannot satisfy the Court's most exacting scrutiny. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976); Ann Carey Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1112 (2001); see *infra* note 207.

26. The *City of Boerne* cases presumed that legislation that "merely parrots the precise wording of the Fourteenth Amendment" was an appropriate exercise of Congress's section 5 power; rather, the controversy in each of these cases was how far beyond that precise wording Congress could venture. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); see also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("[Section 5] legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (emphasis added))).

27. In *Griggs v. Duke Power Co.*, the Supreme Court interpreted Title VII's anti-discrimination provisions to prohibit neutral employment practices that produced a discriminatory effect and were not justified by business necessity. 401 U.S. 424, 431 (1971) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."). See generally EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 123-91 (Samuel Estreicher & Michael C. Harper, eds., 2000). In 1991, Congress codified the relevant burdens of proof in disparate impact cases. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k) (2000)).

28. The Equal Protection Clause does not prohibit facially neutral state action that produces a disparate impact in the absence of a discriminatory purpose. See *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272, 279 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976). Although Congress may enact legislation under section 5 that prohibits state conduct that is not itself unconstitutional, see *Garrett*, 531 U.S. at 365, the Court has been particularly reluctant to approve statutes that impose a heightened burden of scrutiny upon state action that warrants only rational basis review under the Fourteenth Amendment itself. See *id.* at 372 (noting that

entertain a facial challenge to Title VII's abrogation, the Act's abrogation of immunity in suits alleging intentional discrimination may be struck down, even though on its own it easily qualifies as an appropriate means of enforcing the Fourteenth Amendment.

This Note argues that the Court's recent section 5 cases depart from the traditional method of constitutional adjudication. Part I argues that the Court's decisions since *City of Boerne* have introduced a form of overbreadth doctrine into the analysis of section 5 legislation akin to the approach used in the First Amendment context. In particular, the Court has both entertained facial challenges where the traditional rules would not permit them and applied a new standard for evaluating those challenges. Part II challenges the wisdom of this approach, arguing that the new approach is inconsistent with settled principles of judicial review and severability and raises some puzzling internal inconsistencies within the section 5 doctrine. Federalism concerns do not appear to outweigh these difficulties. Part III argues that this new approach has significant ramifications for the substantive outcomes of future civil rights cases, as demonstrated in the context of Title VII. The Note concludes that in light of the many troubling aspects of this method of adjudication, and given the dispositive effect the methodological choice can exert on substantive outcomes, the Court should consider the appropriateness of this approach more explicitly before permitting it to continue.

the ADA imposes significantly greater obligations on state employers than the Equal Protection Clause imposes, and that the Act requires the state to justify its own practices rather than requiring a challenger to prove the irrationality of those practices); *see also Kimel*, 528 U.S. at 86-88 (noting that the Age Discrimination in Employment Act effectively imposed heightened scrutiny on state employment practices even though the Equal Protection Clause only required the practices to have a rational basis). Two courts of appeals have upheld the disparate impact provisions of Title VII on the theory that disparate impact is a tool for proving intentional discrimination and is therefore a congruent and proportional prophylactic measure designed to prevent unconstitutional purposeful discrimination. *See Okruhlik*, 255 F.3d at 626-27 (noting that unintentional disparate impact may be "functionally equivalent" to intentional discrimination and that the "prophylactic" response in Title VII is therefore congruent and proportional); *In re Employment Discrimination Litig.*, 198 F.3d at 1321-22 (noting that a "genuine finding of disparate impact can be highly probative of the employer's motive," such that "the disparate impact provisions of Title VII can reasonably be characterized as 'preventive rules' " that target the same core injury as the Equal Protection Clause). The Supreme Court has hinted, however, that it might find this argument unpersuasive. *See Garrett*, 531 U.S. at 372-73 ("Although disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny."). The validity of the disparate impact provisions ultimately may depend on the Court's evaluation of the evidence before Congress that a broad prophylactic approach was a necessary response to a history or pattern of state employment discrimination. *Cf. Okruhlik*, 255 F.3d at 624-25 (finding sufficient legislative findings); *In re Employment Discrimination Litig.*, 198 F.3d at 1323 (same).

I. SECTION FIVE OVERBREADTH EXPOSED

Since 1997, the Court has decided six cases dealing with Congress's power to enact legislation under section 5 of the Fourteenth Amendment.²⁹ Although none of those cases involved claims under the First Amendment, and although the Court has purported to disfavor facial challenges outside that context, the Court has disposed of each of the cases using a facial analysis. Section I.A argues that the Court has replaced the standard of *United States v. Salerno*,³⁰ the general standard governing facial challenges, with an approach that is more akin to the standard of *Broadrick v. Oklahoma*,³¹ which governs First Amendment overbreadth claims. Section I.B. contends that this section 5 overbreadth approach departs from both the traditional rules of constitutional adjudication and the analysis applied in previous section 5 cases.

A. *Adoption of the Overbreadth Approach in the City of Boerne Cases*

Under the Supreme Court's First Amendment jurisprudence, a litigant may challenge a statute on its face if it burdens a substantial amount of protected expression.³² In this context, a facial challenge proceeds by comparing the challenged statute as a whole against the relevant constitutional standard.³³ Success of such a challenge does not depend on the validity of the particular application before the court, nor does the scope of the analysis depend on the circumstances of the litigant's particular case.³⁴ Instead, the appropriateness of facial invalidation depends upon the existence of a substantial number of illegitimate potential applications relative to the "plainly legitimate sweep" of the statute.³⁵ Although these principles are nominally con-

29. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997). For ease of reference, this Note refers to these cases collectively as the "*City of Boerne* cases."

30. 481 U.S. 739 (1987).

31. 413 U.S. 601 (1973).

32. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (citing *Broadrick*, 413 U.S. at 612).

33. See, e.g., *id.* at 246-49 (conducting a facial analysis by comparing the terms of the Child Pornography Prevention Act with the definition of proscribable obscenity set out in *Miller v. California*, 413 U.S. 15, 24 (1973)).

34. See, e.g., *id.*

35. *Broadrick*, 413 U.S. at 615.

fined to the First Amendment context,³⁶ the Court's recent cases addressing the validity of federal legislation under Congress's power to enforce the Fourteenth Amendment embody the First Amendment overbreadth approach.

Like the approach in First Amendment cases, the approach in the Court's recent section 5 decisions measures the validity of a challenged statute on its face. The now-familiar "congruence and proportionality" test for appropriate section 5 legislation established by the *City of Boerne* cases requires comparison of the challenged statute — both its text and supporting findings — to the substantive provisions of the Fourteenth Amendment.³⁷ In part, this requirement reflects the remedial nature of Congress's section 5 power: As "[l]egislation which alters the meaning of the [Fourteenth Amendment] cannot be said to be enforcing the [Fourteenth Amendment],"³⁸ the Court must ensure that the challenged statute conforms to judicial interpretations of the Fourteenth Amendment.

Since *City of Boerne*, the Court has conducted this comparison solely by reference to the terms of the challenged statutes or the legislative findings supporting the statute. In general, the Court has ignored the facts of the particular cases, assessed the challenged legislation without regard to its appropriateness as applied to the state action in question, and announced holdings that exceeded the scope of the plaintiffs' original claims. In *Kimel v. Florida Board of Regents*,³⁹ for example, the Court considered the validity of the Age Discrimination in Employment Act ("ADEA") under section 5.⁴⁰ Three groups of plaintiffs alleged that their state employer had violated the ADEA by discriminating because of age, by failing to promote older employees, by retaliating against employees who filed complaints with the EEOC, and by utilizing practices with a disparate impact on older employees.⁴¹ The state argued in defense that it was immune from suit, thereby implicating Congress's power to abrogate that immunity under section 5 as a means of enforcing the Equal Protection Clause.⁴² Despite the variety of facts alleged, the Court never paused to consider whether

36. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."). But see *supra* notes 15-16.

37. As the Court first articulated in *City of Boerne*, legislation is "appropriate" under section 5 if it is a congruent and proportional means to achieving the legitimate end of remedying or preventing a violation of the Fourteenth Amendment. 521 U.S. 507, 520 (1997).

38. *City of Boerne*, 521 U.S. at 519.

39. 528 U.S. 62 (2000).

40. *Kimel*, 528 U.S. at 66-67.

41. *Id.* at 69-70.

42. *Id.* at 66; see also *supra* note 6 and accompanying text.

the state employers had in fact violated the Equal Protection Clause in any of these circumstances.⁴³ Despite the variety of ADEA provisions implicated, the Court glossed over any differences in the plaintiffs' claims and the statutory provisions at issue.⁴⁴ Instead, the Court's analysis compared the obligations imposed on state employers by the terms of the Act with those imposed by the Equal Protection Clause, concluding that "[m]easured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers."⁴⁵

Similarly, when considering the constitutionality of the abrogation of state immunity in the ADA as an appropriate enforcement of the Equal Protection Clause, the Court in *Board of Trustees of the University of Alabama v. Garrett*⁴⁶ compared the ADA and its supporting findings against the "metes and bounds of the constitutional right in question."⁴⁷ As in *Kimel*, the *Garrett* Court did not ask whether the state defendant had violated the Equal Protection Clause, nor did it discuss the appropriateness of the ADA's application in the particular circumstances before the Court.⁴⁸ By focusing on the challenged legislation without regard to its appropriateness in the case before the Court, the inquiry in the recent section 5 cases has mirrored the approach in First Amendment facial challenges.⁴⁹

43. The factual circumstances were similarly irrelevant to the Court's decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 644 n.9 (1999) (limiting discussion of whether a due process violation had actually occurred to the observation that "[i]t is worth mentioning that the State of Florida provides remedies to patent owners for alleged infringement on the part of the State"). Although the Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* appeared at times to be more attuned to the factual context of the case, see 527 U.S. 666, 675 (1999) (finding "no deprivation of property at issue here" (emphasis added)), the analysis did not turn on the constitutionality of the state's actions or the appropriateness of the challenged remedial legislation in the particular circumstances before the Court. See *id.* at 705 (Breyer, J., dissenting) ("I do not know whether the State has engaged in false advertising or unfair competition as College Savings Bank alleges. But this case was dismissed at the threshold.").

44. See *Kimel*, 528 U.S. at 86-87. To borrow Professor Fallon's terminology, the analysis in these cases has not distinguished among the various "subrules" contained in challenged legislation, even though the presumption of severability would suggest that some subrules may be applied validly even if others may not. See Fallon, *supra* note 10, at 1334; see also *infra* Section II.B (discussing severability analysis).

45. *Kimel*, 528 U.S. at 87.

46. 531 U.S. 356 (2001).

47. *Garrett*, 531 U.S. at 368.

48. See *id.* at 365-68, 372-73. Similarly, in *Florida Prepaid*, the Court formulated a test that compared the text and legislative history of the Patent Remedy Act against the Fourteenth Amendment: "[F]or Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." 527 U.S. at 639.

49. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246-49 (2002) (comparing the terms of the Child Pornography Prevention Act with the *Miller* definition of obscenity without considering the facts of the immediate case); *Lewis v. City of New Orleans*, 415 U.S.

This is not to say that any method of adjudication that looks beyond the factual circumstances of the particular case necessarily converts into a facial analysis. As Justice Stevens has noted, "the validity of a congressional decision to abrogate sovereign immunity in a category of cases does not depend on the strength of the claim asserted in a particular case within that category."⁵⁰ One need not adopt an artificially stylized view of the as-applied approach, however, to understand the Court's recent section 5 cases as a clear shift to a facial analysis. Total neglect of the factual context in these cases has resulted in holdings that exceed the scope of the claims before the Court. The Court has assessed the validity of congressional abrogation in a category of cases by looking to the strength of potential claims that fall outside the relevant category altogether.⁵¹

The decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*⁵² exemplifies this approach. The plaintiffs in that case sued the state under the federal Patent Remedy Act, alleging a willful patent infringement by the State of Florida.⁵³ Nevertheless, one of the Court's principal reasons for invalidating the abrogation of sovereign immunity in the Act was its potential application in cases of negligent patent infringement.⁵⁴ Moreover, the legislative

130, 133 (1974) (noting that "it is immaterial" whether the litigant's conduct "might be punishable under a properly limited statute or ordinance").

50. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 693 (1999) (Stevens, J., dissenting).

51. This method of measuring the validity of section 5 legislation against the relevant constitutional standard without regard to the particular application or claim in question also characterizes the dissents in the Court's recent cases. In both *College Savings Bank* and *Garrett*, for example, the dissenting Justices argued that the terms and legislative histories of the challenged statutes conformed to the relevant constitutional standards. See, e.g., *Garrett*, 531 U.S. at 385-87 (Breyer, J., dissenting) (comparing the text and legislative history of the ADA with the relevant equal protection standards without regard to the applications before the Court); *Coll. Sav. Bank*, 527 U.S. at 693 (Stevens, J., dissenting) (judging the Lanham Act by reference to the Due Process Clause without regard to the applications before the Court). Although they reach contrary conclusions, these opinions mirror the majority opinions' inattention to the application of the statutes in the particular cases. Only Justice Stevens' dissent in *Florida Prepaid* takes a different approach. Noting that the plaintiffs only alleged a willful patent infringement, the question in that case, according to Justice Stevens, was whether the Patent Remedy Act could be applied to a willful infringement. *Florida Prepaid*, 527 U.S. at 653-54 (Stevens, J., dissenting). Justice Stevens' complaint that the majority's "negative answer to that question has nothing to do with the facts of this case" constitutes the only statement in any opinion in the recent section 5 cases that acknowledges the Court's new facial approach. *Id.* at 654 (Stevens, J., dissenting). This dissent thus represents the only opinion in the recent section 5 cases that confines its analysis to the scope of the claims raised.

52. 527 U.S. 627 (1999).

53. *Florida Prepaid*, 527 U.S. at 632-33. Unlike *Kimel* and *Garrett*, which implicated Congress's power to enforce the Equal Protection Clause, *Florida Prepaid* considered whether the Patent Remedy Act was a valid exercise of Congress's power under section 5 to enforce the Due Process Clause of the Fourteenth Amendment.

54. *Florida Prepaid*, 527 U.S. at 645.

record inadequately justified the need for the Act because it focused only on innocent or negligent infringement.⁵⁵ Finding that "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations," the Court struck down the Act without pausing to consider whether the immediate case in fact involved an arguable constitutional violation.⁵⁶ Similarly, in *City of Boerne*, the Court did not discuss whether the state action at issue actually violated the Constitution, but instead focused on the potential for the statute's broad application in other circumstances.⁵⁷ The scope of the Court's holding thus greatly exceeded the scope of the plaintiff's claim.

Having tacitly elected to entertain facial challenges to section 5 legislation, the Court has adopted an overbreadth approach for evaluating the success of those challenges. As the Court articulated in *United States v. Salerno*,⁵⁸ where no protected First Amendment activity is burdened, a facial challenge traditionally succeeds only if the challenger can "establish that no set of circumstances exists under which the Act would be valid."⁵⁹ The First Amendment overbreadth standard articulated in *Broadrick v. Oklahoma*⁶⁰ constitutes the principal exception to this rule.⁶¹ Whereas the *Salerno* standard requires a challenger to show invalidity in *every* application, the *Broadrick* standard requires a challenger to demonstrate invalidity in a *substantial number* of applications, "judged in relation to the statute's plainly legitimate sweep."⁶² The *City of Boerne* cases involved no First Amendment challenges; as such, any facial analysis in those cases should have been governed by the *Salerno* standard. Nevertheless, the Court analyzed the facial validity of the challenged statutes in those cases under a standard that is very similar to the *Broadrick* overbreadth standard.

City of Boerne spells out this new section 5 overbreadth approach: "Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being

55. *Id.*

56. *Id.* at 646-47; see also Fallon, *supra* note 10, at 1336, 1356-58 (discussing *Florida Prepaid* as an example of the congruence and proportionality test leading to facial invalidation).

57. 521 U.S. 507, 532 (1997) ("[The Act's] [s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

58. 481 U.S. 739 (1987).

59. *Salerno*, 481 U.S. at 745.

60. 413 U.S. 601 (1973).

61. See *supra* notes 14-16 and accompanying text.

62. *Broadrick*, 413 U.S. at 615.

unconstitutional.”⁶³ The logic of the standard proceeds as follows: If there exists some aggregate number of state actions that are quite likely to be unconstitutional, then there will be a concomitant number of applications in which the challenged statute is truly remedial and therefore appropriate under section 5. The statute will only be upheld as an appropriate means of enforcing the Fourteenth Amendment, however, in the event that this aggregate number reaches an unspecified threshold (i.e., “many”). If this number falls short of this threshold, the statute fails the test, even though there exists some positive number of applications in which it might be considered valid. Under *Salerno*, by contrast, the statute would be upheld in that situation, since there exists at least one valid application.⁶⁴ The number of affected state actions with a significant likelihood of being unconstitutional plays the same role under the section 5 approach that the “plainly legitimate sweep” of a statute plays under the First Amendment overbreadth standard.⁶⁵ Under both standards, the Court assesses a facial challenge by comparing the incidence of invalid applications relative to this legitimate sweep.⁶⁶

An examination of the Court’s approach in its recent section 5 cases reveals its similarity to the First Amendment overbreadth standard.⁶⁷ In *City of Boerne*, the Court focused on the “sweeping

63. 521 U.S. 507, 532 (1997); accord *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) (“[T]he ADEA prohibits very little conduct likely to be held unconstitutional . . .”); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (“In sum, it simply cannot be said that ‘many of [the acts of infringement] affected by the congressional enactment have a significant likelihood of being unconstitutional.’” (quoting *City of Boerne*, 521 U.S. at 532)).

64. This assumes that a “valid application” occurs when the challenged statute actually prevents or remedies a particular state action that has a significant likelihood of being unconstitutional. When the number of such applications is “many,” the statute will be upheld under both *Salerno* and the Court’s new standard. When the number of such applications is zero, the statute is invalid under both *Salerno* and the new test. The tests diverge when the number of such applications is greater than zero but less than “many,” in which case the statute survives scrutiny under *Salerno* but fails the section 5 overbreadth approach. For consideration of whether this assumption about what constitutes a “valid application” is incorrect, see *infra* notes 86-98 and accompanying text.

65. See *supra* note 62 and accompanying text.

66. See, e.g., *Ashcroft v. ACLU*, 535 U.S. 564, 584-85 (2002) (rejecting an overbreadth challenge to the Child Online Protection Act because the breadth of invalid applications resulting from the Act’s deviation from the *Miller* definition of obscenity was not substantial enough compared to the Act’s legitimate sweep). There is a subtle difference between the First Amendment and section 5 overbreadth standards. Whereas First Amendment overbreadth holds that a statute is invalid if its *improper* applications are substantial relative to its legitimate sweep, section 5 overbreadth holds that a statute is valid if its *legitimate* applications are “many” in relation to its illegitimate sweep. Under both approaches, the standards rest on the ratio of valid to invalid applications, with account taken of how a statute would operate in hypothetical circumstances.

67. In *City of Boerne*, Justice Kennedy explicitly stated the Court’s concern about the “possibility of overbreadth.” 521 U.S. at 533. Some commentators have argued that the Court similarly has replaced the *Salerno* standard with an overbreadth-type analysis in other contexts, including its consideration of statutes regulating abortion. See Isserles, *supra* note

coverage” of the Religious Freedom Restoration Act (“RFRA”).⁶⁸ Specifically, the Court found that RFRA “intru[ded] at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.”⁶⁹ By comparison, the Court found the Act’s legitimate sweep to be relatively minimal, noting that “[i]n most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.”⁷⁰ RFRA’s invalidity was predicated on this unfavorable ratio of legitimate to illegitimate applications.⁷¹

Later cases took the same approach. In *Florida Prepaid*, the Court again focused on the Patent Remedy Act’s “indiscriminate scope.”⁷² Again, the potential application of the Act to state actions that were not likely to be unconstitutional was too great relative to the plainly legitimate sweep of the Act. Although the Act threatened to impose “expansive liability” for an “unlimited range of state conduct,” Congress had done nothing to “limit the coverage of the Act to cases involving arguable constitutional violations” or to “confine the reach of the Act by limiting the remedy to certain types of infringement.”⁷³ Similarly, in *Kimel*, the ADEA failed under the section 5 overbreadth approach because it “prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.”⁷⁴

The inquiry in these cases mirrors exactly the *Broadrick* formula of a typical First Amendment overbreadth holding. In *Ashcroft v. Free Speech Coalition*,⁷⁵ for example, the Court compared the terms of the Child Pornography Prevention Act of 1996 against the First Amendment standards for the regulation of obscenity, finding the Act’s definitions to exceed the definition of proscribable obscenity set out in *Miller v. California*.⁷⁶ As the Act reached substantially more ex-

10, at 456-63; King, *supra* note 16 (discussing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

68. *City of Boerne*, 521 U.S. at 532.

69. *Id.*

70. *Id.* at 535.

71. See *supra* notes 63-66 and accompanying text. If the Court had applied the *Salerno* standard, this ratio would be irrelevant. The only significant figure in that case would be the number of legitimate applications; any number greater than one would defeat the facial challenge.

72. 527 U.S. 627, 647 (1999).

73. *Florida Prepaid*, 527 U.S. at 646-47.

74. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 86 (2000).

75. 535 U.S. 234 (2002).

76. 413 U.S. 15, 24 (1973) (defining proscribable obscenity as works depicting or describing sexual conduct “which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value”).

pressive conduct than would be obscene under the applicable First Amendment standard, the Court held the Act to be unconstitutionally overbroad.⁷⁷

The Court's treatment of congressional findings in the *City of Boerne* cases also reflects this section 5 overbreadth approach. In each case, the Court has examined the legislative record in search of evidence to support the proposition that many affected state actions have a significant likelihood of being unconstitutional. In *Florida Prepaid* and *Kimel*, for example, Congress's findings did not indicate the presence of sufficient unconstitutional patent infringement or employment discrimination by states to constitute a "problem of national import."⁷⁸ Similarly, the findings supporting the Violence Against Women Act were inadequate in *United States v. Morrison*⁷⁹ because they failed to demonstrate that many affected state actions were likely to be unconstitutional.⁸⁰ The absence of evidence of a widespread pattern or history of unconstitutional state action in these cases illustrated that the legitimate sweep of the challenged statutes was too narrow to justify the subset of hypothetical applications that were not truly remedial or preventive of Fourteenth Amendment violations.⁸¹

One might disagree with this argument that the *City of Boerne* cases are more consistent with *Broadrick* than with *Salerno* by interpreting *Salerno*, not as a test for facial validity, but as a description of a statute that is unconstitutional on its face because of some defect that taints the entire statute.⁸² A statute that is overly vague, for example, gives too much discretion to administering officials and is therefore impermissible.⁸³ As Justice Breyer has explained, such a statute is facially invalid even under the *Salerno* rule because too much discretion exists in every application, regardless of whether that discretion is properly exercised in a particular application.⁸⁴ In other

77. *Free Speech Coalition*, 535 U.S. at 258.

78. *Kimel*, 528 U.S. at 90; *Florida Prepaid*, 527 U.S. at 641.

79. 529 U.S. 598 (2000).

80. *Morrison*, 529 U.S. at 626 (noting that even though the Act applied uniformly nationwide, "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States").

81. See, e.g., *Kimel*, 528 U.S. at 91 ("Congress'[s] failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.").

82. See Isserles, *supra* note 10, at 386 ("*Salerno* is best understood, not as a facial challenge 'test' at all, but rather as a descriptive claim about a statute whose terms state an invalid rule of law: 'no set of circumstances' exists under which such a statute can be constitutionally applied.").

83. See *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

84. *Morales*, 527 U.S. at 71 (Breyer, J., concurring):

words, a court need not consider every conceivable application of a statute to find that it fails the *Salerno* rule because some constitutional defects, such as unlimited discretion, inhere in the terms of the statute itself and therefore taint every application.⁸⁵ Similarly, one could argue that if the absence of congruence and proportionality under *City of Boerne* is a deficiency that pervades an entire statute, then the facial analysis in these cases is in fact perfectly consistent with the *Salerno* standard.⁸⁶

Some features of the *City of Boerne* cases suggest that they may be consistent with this reading of *Salerno*. A principal deficiency in each case, for example, was that the challenged statute imposed a greater burden on state action than the relevant constitutional provision imposed. Thus, in *City of Boerne*, RFRA prohibited state action that substantially burdened religious practice unless it was the least restrictive means of furthering a compelling state interest, even though the First Amendment permitted such state action if it was neutral and generally applicable.⁸⁷ By applying this incorrect free exercise standard to every state action, the Act arguably was invalid in every application. If so, facial invalidation was appropriate even under *Salerno*. Similarly, in the ADEA, Congress had "effectively elevated the standard for analyzing age discrimination to heightened scrutiny," even though such discrimination is constitutionally permissible so long as it is rational.⁸⁸ Since this incorrect standard applied in every application of

The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in every case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.

85. In Professor Fallon's view, facial invalidation occurs because some doctrinal tests mark a statute as invalid as a whole. See Fallon, *supra* note 10, at 1326. Fallon argues that all challenges are as-applied challenges, since a litigant must always assert that a statute may not validly be applied in his case. *Id.* at 1327. But the reason for the statute's invalidity in the litigant's particular case may be failure to satisfy a general substantive test that marks the whole statute invalid. *Id.* at 1327-28. Defects that may render a statute invalid in every application include impermissible purpose; forbidden or suspect content; discrimination or underinclusiveness; undue burden on a fundamental right; or unlimited administrative discretion. See generally Dorf, *supra* note 10, at 251-53, 261-65, 279-81; Fallon, *supra* note 10, at 1346-51; Isserles, *supra* note 10, at 440-46.

86. This Section previously assumed that a "valid application" occurred when a challenged statute actually prevents or remedies a particular state action that has a significant likelihood of being unconstitutional, and that the existence of such an application would defeat a facial challenge under the *Salerno* rule. See *supra* note 64 and accompanying text. The present discussion questions the correctness of that assumption. If the absence of congruence and proportionality is a defect that renders an entire statute invalid, then application of the statute to unconstitutional state action in some cases cannot be considered a "valid application" capable of defeating a facial challenge.

87. *City of Boerne*, 521 U.S. at 514-16 (1997) (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

88. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000).

the Act, the facial invalidation in *Kimel* arguably was perfectly consistent with *Salerno*.⁸⁹

Additionally, the shortcomings in the legislative histories of the statutes at issue in these cases may also have rendered the statutes invalid in every application.⁹⁰ In each case, the Court found that the congressional findings failed to justify the need for prophylactic legislation.⁹¹ Accordingly, since every application of the statute is accompanied by the same set of inadequate findings, the statute is arguably invalid in all its applications.

Closer examination reveals that these holdings do not entail a finding that the statutes are invalid in every application and therefore cannot be described as consistent with *Salerno*. To conclude that the *City of Boerne* cases are consistent with *Salerno* because the statutes applied the wrong constitutional standard in every case would be to stretch the *Salerno* standard wide enough to eliminate its principal exception. If deviation from the relevant constitutional rule rendered a statute invalid in all its applications, then any statute that burdened protected expression by deviating from the relevant First Amendment standard could also be described as invalid in all of its applications, even where the deviation did not satisfy the requirement that overbreadth be "substantial."⁹² Under that expansive view of *Salerno*, there would be no need for the overbreadth exception.⁹³ To the extent that any distinction is to be maintained between the two standards, the *Salerno* rule cannot absorb either the First Amendment overbreadth doctrine or the *City of Boerne* cases that replicate it.⁹⁴

89. See also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372 (2001) ("[The ADA's] accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer. The Act also makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision.").

90. See Fallon, *supra* note 10, at 1357 ("[M]uch of the Court's analysis in *Florida Prepaid* emphasized deficiencies in the Patent Remedy Act's historical origins involving Congress's factfinding and deliberative processes. Conceivably the Court regarded the deliberative deficiencies as pervading every possible subrule into which the statute might be specified.").

91. See *supra* notes 78-81 and accompanying text.

92. On this theory, the Child Online Protection Act should have been struck down under the *Salerno* rule because the statute applied an incorrect definition of proscribable obscenity in each and every application. See *Ashcroft v. ACLU*, 535 U.S. 564 (2002). The Court upheld the Act despite its deviation from the constitutional standard, however, because the deviation was not of sufficient magnitude to reach a "substantial" amount of protected conduct. *Id.* at 584-85.

93. Indeed, such a reading also erases the distinction between facial and as-applied challenges. Any facial challenge in which a litigant claimed that a statute was impermissibly overbroad could be recharacterized as an as-applied challenge because, under this expansive reading, the overbreadth of the statute would render it invalid in every application, including the application to the particular litigant. See Fallon, *supra* note 10, at 1336-38.

94. Isserles has explained the distinction between the *Salerno* standard and the overbreadth standard. See Isserles, *supra* note 10, at 363-64. In his view, overbreadth "predicates

Nor may deficiencies in Congress's findings be described as tainting every application of a statute. Evidence of a history or pattern of widespread unconstitutional state action is necessary to justify prophylactic measures that affect a significant amount of constitutional state action.⁹⁵ Applications of a remedial statute to core constitutional violations are valid by definition and presumably do not require support in the legislative record.⁹⁶ The congruence and proportionality test developed in *City of Boerne* — including its attention to legislative findings — applies with regard to prophylactic statutes that restrain constitutional state action as a means of remedying unconstitutional state action.⁹⁷ This standard does not require legislative findings to demonstrate the congruence and proportionality of a statute that by its very terms applies only to core constitutional violations.⁹⁸ As such, when a statute reaches both core constitutional violations and conduct that is not itself unconstitutional, it is only the existence of the latter category of applications that calls for an analysis of Congress's findings. Any inadequacy in those findings damages only those applications of the statute that lie at the periphery of the Fourteenth Amendment. It cannot be said to render the statute invalid in every application.

facial invalidity on some aggregate number of unconstitutional applications of an otherwise valid rule of law," while *Salerno* describes a valid rule facial challenge, which "predicates facial invalidity on a constitutional defect inhering in the terms of the statute itself, independent of the statute's application to particular cases." *Id.* In a typical First Amendment overbreadth case, a litigant who has engaged in constitutionally proscribable conduct challenges a statute by arguing that it reaches others whose conduct is constitutionally protected. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The extension of such a statute to protected conduct may result from the statute's incorporation of a definition of prohibited conduct that deviates from the constitutional rule. See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130, 132-33 (1974) (invalidating a Louisiana ordinance that prohibited "curs[ing]," "revil[ing]," and using "obscene or opprobrious language" toward a police officer because the ordinance reached beyond the constitutional definition of proscribable fighting words). Whether to call such a statute "overbroad" or to describe it as "invalid in every application" is more than a semantic distinction, since overbreadth must be "substantial" before the statute may be invalidated on its face. See *ACLU*, 535 U.S. at 584-85.

95. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) ("Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. . . . One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress'[s] action."); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.").

96. See *supra* note 26.

97. See *supra* note 26.

98. Consider, for example, a federal statute prohibiting states from intentionally maintaining racially segregated public schools. The statute unquestionably would constitute an appropriate means of enforcing the Fourteenth Amendment because the prohibited state action clearly violates that Amendment. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Whether Congress amassed a legislative record detailing the existence of a widespread pattern of segregated schools would be irrelevant. See *supra* note 26.

B. *Section Five Overbreadth as a Departure from Precedent*

The section 5 overbreadth approach adopted in the *City of Boerne* cases departs from the Court's traditional method of adjudicating constitutional challenges to federal statutes and from its earlier section 5 decisions. *United States v. Raines*⁹⁹ provides the archetypal rule. In that case, the Court considered the constitutionality under the Fifteenth Amendment of the Civil Rights Act of 1957, which authorized the United States to sue any person who interfered with the right to vote on the basis of race.¹⁰⁰ Although the defendant in the case was a state official, the district court invalidated the Act because of its potential application to private persons.¹⁰¹ The Supreme Court reversed, holding that "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality."¹⁰² The scope of the Court's inquiry was thus confined to the statute as it was applied in the factual context before the Court.

This general approach has governed most areas of constitutional adjudication outside the First Amendment context.¹⁰³ Although few in number, the Court's pre-*City of Boerne* cases discussing the constitutionality of enforcement legislation under the Reconstruction Amendments were no exception.¹⁰⁴ These earlier cases discussed the

99. 362 U.S. 17 (1960).

100. *Raines*, 362 U.S. 17 (1960).

101. *Id.* at 20.

102. *Id.* at 24-25. The Court's unwillingness to reach a decision that exceeded the scope of the complaint reflected concerns about the proper scope of judicial review. Noting that "[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them," *id.* at 20, the Court concluded that "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases" *Id.* at 22. As Professor Fallon has noted, the rationale of the *Raines* decision also related to principles of statutory interpretation. See Fallon, *supra* note 10, at 1330-31. In particular, the full meaning of a statute might not be clear in a hypothetical application; invalid portions might also be subject to severing or a limiting construction. *Id.*

103. See HART & WECHSLER, *supra* note 10, at 197. As has been noted, the Court developed exceptional rules in the First Amendment context. In so doing, the Court noted its reluctance to depart from the usual rule of *Raines*: "These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); see also Monaghan, *supra* note 10, at 279 (noting that the principles developed in *Raines* and other cases "reflected a powerful and pervasive view of the nature of constitutional adjudication, the animating premise of which denied that courts possessed a general commission to make pronouncements on the meaning of the Constitution or to enforce public norms").

104. The dearth of cases decided under section 5 of the Fourteenth Amendment prior to the mid-1990s resulted primarily from the ease with which federal legislation could be upheld under Congress's broad power to regulate interstate commerce. See *United States v. Lopez*, 514 U.S. 549, 556-59 (1995) (reviewing modern commerce clause jurisprudence). When the Court held in 1996 that Congress could only abrogate state sovereign immunity

validity of statutes in terms of the factual context of particular cases. Moreover, the holdings in those earlier cases did not reach beyond that context. The Court maintained this application-oriented approach throughout its cases considering the constitutionality of the Voting Rights Act of 1965.¹⁰⁵ In *South Carolina v. Katzenbach*,¹⁰⁶ for example, the Court relied on *Raines* to confine its analysis only to those provisions of the Act properly before the Court.¹⁰⁷ The Court's discussion of the validity of each challenged provision focused on its application in South Carolina.¹⁰⁸ The appropriateness of the Act's prohibition on the use of literacy tests and other devices, for example, was measured in light of South Carolina's historically discriminatory use of such devices.¹⁰⁹

Subsequent section 5 cases continued to follow the *Raines* method. In *Katzenbach v. Morgan*,¹¹⁰ the Court began its analysis of section 4(e) of the Voting Rights Act by noting that the scope of its inquiry was limited by the scope of the plaintiffs' challenge.¹¹¹ The Court proceeded to consider the rationality of that section by reference to its application to the plaintiffs and concluded that by prohibiting the State of New York from denying the right to vote to large segments of its Puerto Rican community, section 4(e) furthered the aims of the

when exercising its power to enforce the Fourteenth Amendment, see *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), it became necessary to assess the validity of legislation under section 5 regardless of its validity under the commerce clause. See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 78-80 (2000) (noting that the Court had previously upheld the Age Discrimination in Employment Act as a valid exercise of Congress's power to regulate interstate commerce, but that *Seminole Tribe* required determination of the Act's validity under section 5 of the Fourteenth Amendment). Accordingly, the Court considered section 5 issues more sporadically prior to the mid-1990s. Nevertheless, those cases did follow the ordinary methods of adjudication set out in *Raines*. See *infra* notes 105-119 and accompanying text. Moreover, cases evaluating legislation under section 2 of the Fifteenth Amendment customarily govern section 5 cases (and vice versa), because Congress's power under those enforcement clauses is treated as co-extensive. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

105. See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

106. 383 U.S. 301 (1966). At first glance, the Court's decision in *South Carolina v. Katzenbach* appears to analyze the Voting Rights Act on its face. South Carolina had filed a claim under the Supreme Court's original jurisdiction seeking a declaratory judgment that the statute was unconstitutional and raising no issues of fact. *Id.* at 307.

107. *Id.* at 317 (finding South Carolina's challenge to certain provisions of the Act to be "premature" because "[n]o person ha[d] yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize" (citing *Raines*, 362 U.S. at 20-24)).

108. See *id.* at 333-34 (discussing the application of the Voting Rights Act's coverage formula in South Carolina and the discriminatory use of literacy tests and other devices in South Carolina).

109. See *id.*

110. 384 U.S. 641 (1966).

111. *Morgan*, 384 U.S. at 644 n.3.

Equal Protection Clause and was therefore valid under section 5 of the Fourteenth Amendment.¹¹² Relying on *Raines*, the Court also rejected the plaintiffs' argument that section 4(e) itself violated the Equal Protection Clause because the plaintiffs lacked a "sufficient personal interest" to raise the argument.¹¹³ The Court's section 5 analysis accordingly was highly attuned to the factual context and the scope of the case before it.¹¹⁴

Just as the *City of Boerne* cases departed from the Court's general rules with the initial move toward adjudicating these section 5 cases as facial challenges, the application of an overbreadth standard to assess the success of those challenges likewise diverges from the Court's earlier cases. In *Katzenbach v. Morgan*, for example, the Court made clear that Congress could enact legislation under section 5 that reached state action that did not violate the Constitution.¹¹⁵ This holding in no way depended on the actual existence of many affected state actions that had a significant likelihood of being unconstitutional; all the Court required was that Congress rationally might have determined that the legislation furthered the aims of the Fourteenth Amendment.¹¹⁶ Finding such a rational basis, the Court upheld this "overbroad" statute that prohibited a substantial amount of state conduct that was not unconstitutional.¹¹⁷ The Court continued this approach in *City of Rome v. United States*,¹¹⁸ upholding portions of the Voting Rights Act without requiring any threshold number of state ac-

112. *Id.* at 652.

113. *Id.* at 657.

114. More recently, the Court considered the validity under the Fifteenth Amendment of certain preclearance requirements of the Voting Rights Act. *City of Rome v. United States* continued the as-applied approach of the earlier section 5 cases by framing the issue as whether the Act "may not properly be applied to the electoral changes and annexations disapproved by the Attorney General." 446 U.S. 156, 172 (1980). Dissenting from the Court's decision to uphold the Act, then-Justice Rehnquist repeatedly grounded his discussion of the statute in the facts of the particular case, *see, e.g., id.* at 207, 209, 210 (Rehnquist, J., dissenting), at times arguing that the majority had not placed enough weight on those facts. *See id.* at 214 (Rehnquist, J., dissenting) ("What the Court explicitly ignores is that *in this case* the city has proved that these changes are not discriminatory in purpose. Neither reason nor precedent supports the conclusion that *here it is 'appropriate'* for Congress to attempt to prevent purposeful discrimination by prohibiting conduct which a locality proves is not purposeful discrimination." (emphasis added)).

115. 384 U.S. at 648-49 (noting that requiring a judicial determination that the state action was unconstitutional would reduce the legislative power "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional . . .").

116. *Morgan*, 384 U.S. at 652-56.

117. *Id.* at 653-56.

118. 446 U.S. 156 (1980). As has been noted, the same principles apply to the Court's analyses of legislation enacted under both section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment. *See supra* note 104.

tions that were likely to be unconstitutional.¹¹⁹ Accordingly, the *City of Boerne* cases represent a clear departure from previous section 5 precedent.

II. PATHOLOGIES OF SECTION FIVE OVERBREADTH

By invalidating statutes because they potentially reach too much constitutional state action relative to their plainly legitimate sweep, the Court's section 5 overbreadth approach departs from the traditional rules governing facial challenges and from its previous section 5 cases. In forging this approach, however, the Court has not explicitly addressed its merits or drawbacks.¹²⁰ This Part considers some difficulties of this new approach, arguing that it raises questions in several settled areas of law. Section II.A argues that the new approach of the *City of Boerne* cases conflicts with several principles relating to the proper scope of judicial review. Section II.B contends that the new approach is also out of step with settled principles of statutory severability. Section II.C argues that this approach is inconsistent with the substantive standards guiding the Court's recent section 5 decisions. Finally, Section II.D considers and rejects a federalism-based justification for this new approach.

A. *The Proper Scope of Judicial Review*

The Court's new approach to adjudicating challenges to section 5 legislation conflicts with several fundamental principles limiting the power of courts to invalidate acts of Congress. In particular, this approach appears to exceed the proper scope of judicial review by departing from traditional axioms relating to separation of powers, deference to legislative judgments, and the function of courts to adjudicate concrete cases and controversies. Such a development is particularly incongruous with the Court's efforts in the *City of Boerne* cases to reinforce the appropriate division of responsibility between Congress and the courts.¹²¹

119. *City of Rome*, 446 U.S. at 177. Justice Stevens's concurring opinion in *City of Rome* makes clear that overbreadth was not fatal under the pre-*Boerne* standards. *See id.* at 193 (Stevens, J., concurring) ("I think it is equally clear that remedies for discriminatory practices that were widespread within a State may be applied to every governmental unit within the State even though some of those local units may have never engaged in purposeful discrimination themselves.").

120. *See supra* note 20.

121. *See City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997) (emphasizing the distinction between Congress's "sphere of power and responsibilities" and the "province of the Judicial Branch"); *see also* Larry D. Kramer, *The Supreme Court 2000 Term-Foreword: We the Court*, 115 HARV. L. REV. 4, 135-36 (2001) (describing *City of Boerne* as illustrative of the Rehnquist Court's efforts to assert judicial supremacy in the area of constitutional interpretation).

As the Court has consistently observed, the justification for the exercise of judicial review first expressed in *Marbury v. Madison*¹²² derives from the necessity of determining the constitutional validity of a statute in order to decide a specific case or controversy.¹²³ Moreover, the appropriate exercise of judicial review is further bounded by the constitutional separation of powers and the attendant deference owed to the legislature by the courts.¹²⁴ These principles explained the as-applied posture the Court adopted in its section 5 cases prior to *City of Boerne*.¹²⁵ Even in one of its more recent section 5 cases, the Court has acknowledged that “[d]ue respect for the decisions of a coordinate branch of Government demands that [the Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.”¹²⁶

In recognition of these general principles of judicial review, the Court has long adhered to several specific rules of restraint, all of which are implicated by the Court’s new approach to analyzing section 5 legislation. Principal among these rules is that a court should decide only concrete cases: “The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.”¹²⁷ This preference derives not only

122. 5 U.S. (1 Cranch) 137, 178 (1803):

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

123. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973) (“Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court . . .”); *United States v. Raines*, 362 U.S. 17, 20-21 (1960) (“The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. . . . This Court, as is the case with all federal courts, ‘has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.’” (quoting *Liverpool, N.Y. & Phil. S.S. Co. v. Comm’rs of Emigration*, 113 U.S. 33, 39 (1885))).

124. See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 185-88 (1997) (discussing the incompatibility between the holding in *City of Boerne* and the “presumption of constitutionality”). Noting that “[i]t is often said that within a certain range of legitimate interpretations of the Constitution courts must defer to the decisions of the elected branches,” *id.* at 185, Professor McConnell argues that “for several reasons, *Boerne* was an especially appropriate case for application of the presumption [of constitutionality].” *Id.* at 186.

125. See *supra* Section I.B.

126. *United States v. Morrison*, 529 U.S. 598, 607 (2000).

127. *Raines*, 362 U.S. at 22; *accord Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912) (“[T]his court must deal with the case in hand and not with imaginary ones.”); HART & WECHSLER, *supra* note 10, at 197 (noting the policy that “to permit adjudication to turn on hypothetical disputes would give too abstract a flavor to con-

from the *Marbury* justification for judicial review,¹²⁸ but also from the institutional argument that optimal judicial decisionmaking occurs in the context of an adversarial process presenting specific and concrete facts and legal issues.¹²⁹

As both courts and commentators have recognized, entertaining a facial challenge that is not anchored in the facts of a particular case is necessarily in tension with this preference for concrete cases.¹³⁰ By pronouncing on the validity of section 5 legislation by reference to hypothetical applications, the Court has exercised its "delicate power" in a manner that collides with "the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."¹³¹ Despite this apparent discord between the use of overbreadth analysis in the section 5 context and the principles favoring adjudication of concrete cases, the Court has not offered any "weighty countervailing policies"¹³² warranting an exception to these principles in the section 5 context.

A second rule of restraint developed in recognition of the proper scope of judicial review is the axiom that a court ought not to formulate a holding that is broader than is necessary to vindicate the legal rights of the parties to the case before the court.¹³³ In particular, the Court has noted that "a federal court should not extend its invali-

stitutional litigation"); Fallon, *supra* note 10, at 1330 (noting the rule favoring adjudication of concrete cases between particular individuals and not hypothetical cases).

128. See *supra* notes 122-123 and accompanying text.

129. See, e.g., HART & WECHSLER, *supra* note 10, at 82. Whether litigation is viewed under a private-rights or public-rights model, certain "functional requisites of effective adjudication" are satisfied only in the context of a concrete case or controversy. *Id.* These include "a concrete set of facts as an aid to the accurate formulation of the legal issue to be decided;" "an adversary presentation of evidence as an aid to the accurate determination of the facts out of which the legal issue arises;" "an adversary presentation in the formulation and decision of the legal issue;" and "a concrete set of facts [to limit] the scope and implications of the legal determination, and as an aid to its accurate interpretation." *Id.*

130. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 74-77 (1999) (Scalia, J., dissenting) (noting that the rationale supporting judicial review "only extends so far as to require us to determine that the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case," and that it is "fundamentally incompatible with [the constitutional system] for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications"); Isserles, *supra* note 10, at 361 (noting the inherent tension between facial invalidation and "core principles underpinning Article III courts that require resolution of concrete disputes . . .").

131. *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); see also *Morales*, 527 U.S. at 77 (Scalia, J., dissenting) (describing a holding that a statute is unconstitutional in all applications instead of as applied to the person before the court as "no more than an advisory opinion — which a federal court should never issue at all . . .").

132. *Broadrick*, 413 U.S. at 611 (quoting *Raines*, 362 U.S. at 22-23).

133. *Raines*, 362 U.S. at 21 (recognizing the rule "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885))).

dation of a statute further than necessary to dispose of the case before it."¹³⁴ From this premise, it follows that if a litigant can prevail on an as-applied challenge, the court should not reach the question of overbreadth.¹³⁵ Thus, even if each statute challenged in the *City of Boerne* cases exceeded Congress's enforcement power as applied to the defendant states in those cases, the analyses and holdings of those cases clash with this rule disfavoring facial invalidation that exceeds what is necessary to resolve the controversy before the court.¹³⁶

Finally, the method of adjudication adopted in the Court's recent section 5 decisions is at odds with courts' obligation to avoid deciding constitutional questions unnecessarily and to construe statutes to avoid constitutional infirmities where possible.¹³⁷ As Justice Frankfurter remarked, "To deal with legislation so as to find unconstitutionality is to reverse the duty of courts to apply a statute so as to save it."¹³⁸ Like other rules of judicial restraint, this precept recognizes deference to the legislature as a limit on the proper scope of judicial review.¹³⁹ In the *City of Boerne* cases, the Court has passed over the as-applied questions and moved directly to examining the degree of overbreadth in the challenged statutes.¹⁴⁰ Just like the First Amendment approach they replicate, these cases proceed by seeking

134. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985).

135. See *id.* at 504-06 (reversing a facial invalidation of a statute regulating obscenity and holding that the statute should have been invalidated only insofar as it reached protected materials); see also Isserles, *supra* note 10, at 454-55 (discussing the general rule that a court should not invalidate a statute further than necessary to dispose of the immediate case).

136. In *Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank*, for example, the Court discussed the Patent Remedy Act's inappropriateness in cases of remedied or unintentional patent infringement, even though those considerations were not raised on the facts of the case. 527 U.S. 627, 645-47 (1999). According to *Brockett*, this pronouncement should have been avoided if the Act was in fact inappropriate as applied in the actual circumstances before the Court. 472 U.S. at 504-06. It may be argued that the Act's invalidity in the potential applications to remedied or unintentional patent infringement was the very reason for its invalidity in the particular factual context of the case, and that this pronouncement was therefore a necessary step in the Court's reasoning. See *Florida Prepaid*, 527 U.S. at 645-47. This argument, however, parallels the reasoning of a First Amendment overbreadth analysis, see *supra* Section I.A., which was precisely the kind of argument facing the *Brockett* Court when it reiterated "the normal rule that partial, rather than facial, invalidation is the required course." 472 U.S. at 504.

137. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

138. *Raines*, 362 U.S. at 28 (Frankfurter, J., concurring).

139. See *DeBartolo*, 485 U.S. at 575 ("This approach . . . recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

140. See *supra* Section I.A.

out potential unconstitutional applications. As a result, the Court has missed possible opportunities to avoid constitutional issues through use of limiting constructions.¹⁴¹ Thus, the Court's method of adjudicating the *City of Boerne* cases strikes a dissonant note in light of the courts' obligation to avoid constitutional difficulties.

In response to this indictment of the Court's new section 5 overbreadth approach, one might argue that each of these inconsistencies arises in the First Amendment overbreadth context as well. When a court searches for impermissible overbreadth in a statute that burdens protected expression, it considers how the statute might apply in hypothetical cases and often invalidates statutes in their entirety.¹⁴² If an approach that is inconsistent with principles of judicial review is permissible in the First Amendment context, one might argue that such conflicts likewise raise no difficulties in the *City of Boerne* cases.

In the First Amendment context, however, these conflicts are tolerated because of the privileged status of the individual rights at stake and because of the likelihood that persons not before the court will be deterred from exercising their expressive rights.¹⁴³ In the Court's view, expressive rights are not only foundational to individual freedom and autonomy¹⁴⁴ but also uniquely vulnerable to inhibition: a court must consider the potential impact of a statute in hypothetical cases because persons not before the court might never risk prosecution by engaging in protected expression that appears to be prohibited.¹⁴⁵ No direct analogue to this reasoning arises in the section 5 context.¹⁴⁶ The paramount importance of individual expressive rights is not at stake, and there is no obvious chilling effect on states' ability or willingness to raise constitutional challenges to section 5 statutes.

141. Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."); Isserles, *supra* note 10, at 361 (asserting that facial invalidation is in tension with the courts' obligation to determine constitutional questions only as a matter of last resort). In a way, this failure to consider limiting constructions before invoking overbreadth and the failure to consider statutory severability are opposite sides of the same coin. See *infra* note 169.

142. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 247-49 (2002) (considering the hypothetical application of the Child Pornography Prevention Act of 1996 to literary works and contemporary films).

143. See *id.* at 244 ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."); see also *infra* note 188 and accompanying text.

144. See *id.* at 253 ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.").

145. *Id.* at 244 ("[T]his case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law.").

146. For a discussion of whether states' rights serve to justify these deviations from ordinary principles of judicial review, see *infra* Section II.D.

Accordingly, these conflicts between the section 5 overbreadth approach and the proper scope of judicial review cannot be defended as a parallel to First Amendment overbreadth doctrine.

B. Severability

In each of the *City of Boerne* cases, the Court has invalidated section 5 legislation on the basis of statutory provisions or applications that were not implicated by the specific facts or claims raised. By passing over the question of whether those provisions or applications were separable from those raised in the cases before the Court, the Court's recent section 5 cases are inconsistent with "well established"¹⁴⁷ principles of statutory severability.

In general, the severability question asks whether the invalidity of one portion of a statute renders the remainder of the statute ineffective.¹⁴⁸ The Court has called it an "elementary principle" that "the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected."¹⁴⁹ Adherence to this principle ensures that the judicial power to invalidate acts of Congress does not encroach on the constitutional separation of powers by striking down more of a statute than is necessary in a given case.¹⁵⁰

Challenges to federal statutes¹⁵¹ may raise questions of severability in a number of possible procedural postures.¹⁵² For example, a litigant challenging a statute on its face might argue that if any single provision or application of the statute is both unconstitutional and nonseverable, then the statute is invalid *in toto*.¹⁵³ Alternatively, a litigant

147. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 (1987) (holding the legislative veto contained in the Airline Deregulation Act of 1978 to be severable from the rest of the Act).

148. See generally John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

149. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quoting *Allen v. Louisiana*, 103 U.S. 80, 83-84 (1881)).

150. See, e.g., Nagle, *supra* note 148, at 226 ("Striking down an entire statute as nonseverable when the legislature intended otherwise expands judicial power. The invalidation of statutory provisions that the legislature wanted to enact, that are within the legislature's power to enact, and that the legislature could unquestionably enact standing alone correspondingly decreases the power of the legislature.").

151. On severability analysis of state statutes, see HART & WECHSLER, *supra* note 10, at 198.

152. Nagle, *supra* note 148, at 208-09.

153. *Id.* at 208. In *New York v. United States*, for example, the petitioners challenged the Low-Level Radioactive Waste Policy Amendments Act of 1985 in its entirety. 505 U.S. 144 (1992). Having held the take title provision of the Act to be unconstitutional, the Court proceeded to address the severability question, finding that the provision was severable and the remainder of the Act could be left in force. *Id.* at 186-87. Similarly, in *Buckley v. Valeo*, the

might claim that a particular statutory provision that is not itself unconstitutional is nevertheless ineffective because of its nonseverability from another, purportedly unconstitutional, provision.¹⁵⁴ Finally, a litigant might challenge a particular application of a statute as invalid because it is not severable from other purportedly unconstitutional applications.¹⁵⁵

In whatever form it arises, the severability question is governed by a well-established standard: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."¹⁵⁶ Like many approaches to statutory interpretation,¹⁵⁷ this test calls for an examination of legislative intent through inspection of the structure, purpose, and legislative history of the challenged statute.¹⁵⁸ Application of the test also focuses

Court applied severability analysis to decide whether a portion of the Federal Election Campaign Act of 1971 upheld against a facial challenge was nevertheless ineffective because other portions of the Act were unconstitutional. 424 U.S. 1, 108-09 (1976). The Court held the provision to be severable. *Id.*

154. Nagle, *supra* note 148, at 208. *Alaska Airlines, Inc. v. Brock* is illustrative. 480 U.S. 678 (1987). There, the plaintiffs challenged certain provisions of the Airline Deregulation Act of 1978 on the grounds that they were not severable from the purportedly unconstitutional legislative veto also contained in the Act. *Id.* at 680. The Court concluded that the provisions were severable. *Id.* at 697.

155. Nagle, *supra* note 148, at 208-09. *Wyoming v. Oklahoma* illustrates the problem of separable applications. 502 U.S. 437 (1992). There, the Court considered the severability of the unconstitutional application of an Oklahoma law to private corporations engaged in interstate commerce from the permissible application of the same law to a state agency engaged in interstate commerce. *Id.* at 459-61. As Nagle has noted, these examples do not exhaust the situations in which severability might become an issue. Nagle, *supra* note 148, at 208-09. In *I.N.S. v. Chadha*, for example, severability became an issue when the government argued that if the petitioner's constitutional challenge prevailed, it would render the challenged statute invalid *in toto*, including its remedial provisions, thereby depriving the petitioner of any avenue for relief under the statute. 462 U.S. 919, 931 (1983).

156. *New York v. United States*, 505 U.S. at 186 (quoting *Alaska Airlines*, 480 U.S. at 684); accord *Chadha*, 462 U.S. at 931-32; *Buckley*, 424 U.S. at 108; *Champlin Refining Co. v. Corp. Comm'n*, 286 U.S. 210, 234 (1932). For criticisms of how the Court has applied this test, see Nagle, *supra* note 148, at 206, 211, which notes the general shortcomings of the test and argues that the focus on legislative intent is appropriate but that the analysis searches for that intent incorrectly, and Stern, *supra* note 148, at 111-14, which argues that the Court's severability decisions cannot be neatly reconciled and frequently reflect the Court's attitudes toward the merits of the underlying claims.

157. Nagle has noted the similarities between severability analysis and other problems in statutory interpretation. Nagle, *supra* note 148, at 257 ("[T]he issue of severability is no different than other questions of statutory construction.").

158. See, e.g., *Alaska Airlines*, 480 U.S. at 687-96 (discussing both the structure of the Act and its legislative history as evidence of Congress's intent regarding severability); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985) ("Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature has passed an inseverable Act or would not have passed it had it known the challenged provision was invalid."); *Chadha*, 462 U.S. at 932-34 (focusing on legislative intent in relation to severability). As Nagle has argued, the central role of legislative intent in the severability inquiry guards against excessively legislative behavior by courts. Nagle, *supra* note 148, at 226 ("[I]f

on the operability of the statute in the absence of the unconstitutional provisions.¹⁵⁹

Although no majority Supreme Court opinion has explicitly announced a presumption of severability,¹⁶⁰ such a presumption — or at least a strong preference — appears to operate in the Court's severability decisions.¹⁶¹ Some of the Court's language states that in the absence of clear evidence of contrary legislative intent or consequent inoperability of the statute, the unconstitutional provision "must" be severed.¹⁶² Moreover, other principles of constitutional adjudication, including the *Salerno* standard governing facial challenges, arguably embody a presumption of severability.¹⁶³ The strength of this tendency in favor of severability is demonstrated empirically by the rarity with which the Court invalidates statutes as inseverable.¹⁶⁴ Accordingly, although it need not be a threshold question in every

a court construes a statute as severable contrary to the legislature's intent, the statutory provisions that remain in effect are akin to a new statute of the court's design, not the legislature's").

159. See, e.g., *New York v. United States*, 505 U.S. at 186-87 (focusing on whether the statute would still serve Congress's objectives in the absence of the invalid provision); *Alaska Airlines*, 480 U.S. at 684 ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."); *Chadha*, 462 U.S. at 934 ("A provision is further presumed severable if what remains after severance 'is fully operative as a law.' " (quoting *Champlin Refining Co. v. Corp. Comm'n*, 286 U.S. 210, 234 (1932))).

160. A four-Justice plurality in *Regan v. Time, Inc.* asserted that the "presumption" was in favor of severability. 468 U.S. 641, 653 (1984). Nagle has found that the lower federal courts rely on this statement. Nagle, *supra* note 148, at 220. The Court has made clear that a presumption of severability does arise when a statute contains a clause stipulating to its severability. *Chadha*, 462 U.S. at 932.

161. On historical shifts in the Court's severability presumptions, see Nagle, *supra* note 148, at 218; Stern, *supra* note 148, at 79.

162. See, e.g., *Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."). The *Alaska Airlines* Court also quoted with approval the admonition of the *Regan* plurality that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Id.* at 684 (internal quotation marks and citation omitted).

163. See Dorf, *supra* note 10, at 250-51 (discussing *United States v. Salerno*, 481 U.S. 739 (1987)). Professor Dorf argues that the *Salerno* standard for assessing the success of facial challenges — requiring a challenger to show that "no set of circumstances exists" in which the statute would be valid — necessarily entails a presumption of severability because it assumes that if there existed any valid applications, "a court should construe them as a separate, constitutional Act." *Id.* at 250. "Conversely," Dorf continues, "if a statute has no constitutional applications, then no statute remains after a court severs the unconstitutional applications." *Id.*; see also Fallon, *supra* note 10, at 1333 (discussing the adjudicative approach of *United States v. Raines* as embodying a presumption of statutory severability).

164. As of 1993, the Court had not invalidated a single statute as inseverable since the 1930s. Nagle, *supra* note 148, at 220.

case,¹⁶⁵ this near-presumption suggests that a court should not invalidate a federal statute on the basis of extraneous provisions or applications without explicitly addressing whether those provisions or applications may be severed from the portion of the statute at issue in the case.¹⁶⁶

Notwithstanding these established principles, the Court in *City of Boerne* and subsequent section 5 cases has omitted any severability analysis despite its clear relevance in those cases.¹⁶⁷ In *Florida Prepaid*, for example, the Court assessed the validity of the Patent Remedy Act in a case involving willful patent infringement in part by reference to the statute's applicability in cases of negligent patent infringement.¹⁶⁸ Even assuming that the Act exceeded Congress's section 5 power when applied to negligent patent infringements, the normal course of action in such a situation would be to assess whether that purportedly unconstitutional application could be severed or whether it rendered the entire statute invalid.¹⁶⁹ That is, the invalidity of the statute as

165. Severability is often a threshold question, see *Alaska Airlines*, 480 U.S. at 680; *Chadha*, 462 U.S. at 931, but the Court occasionally decides the constitutional questions first, addressing severability only after a statutory provision has been held unconstitutional. See *New York v. United States*, 505 U.S. 155, 186 (1992); *Buckley v. Valeo*, 424 U.S. 1, 108 (1976).

166. Principles of judicial review and separation of powers also counsel in favor of a presumption of severability. See *Nagle*, *supra* note 148, at 250 (arguing that a rule favoring severability is justified by the principles that (1) statutes should be construed to avoid constitutional questions; (2) statutes are presumed to be constitutional; (3) where possible, a constitutional construction of a statute should be adopted; (4) a court should give effect to a statute to the maximum extent permitted by the Constitution; and (5) a court should strike down only those portions of a statute that are necessary to resolve the immediate case); *Stern*, *supra* note 148, at 84 (arguing that severability is supported by the considerations that litigants may only complain about a statute insofar as it is applied to their disadvantage, that courts should deal with real cases as opposed to imaginary ones, and that courts should apply a saving construction to a statute where possible). But see *Stern*, *supra* note 148, at 85 (noting that the act of invalidating select statutory language or construing a statute more narrowly than its plain meaning may constitute the making of new law properly reserved to the legislature).

167. None of the six section 5 cases since *City of Boerne* address any issue of severability. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

168. 527 U.S. at 645; see *supra* notes 52-56 and accompanying text.

169. Cf. *Alaska Airlines*, 480 U.S. at 680 (asking whether a purportedly unconstitutional statutory provision was severable from the challenged portion of the statute). The severability problem in *Florida Prepaid* differs from the *Alaska Airlines* problem in that it involves a problem of separable applications of a single statutory provision instead of separable statutory language. *Stern* has noted that the problem of separable language is easier than the problem of separable applications because it does not require a court to read limiting words into a statute or deal with the indefiniteness that results from permitting language to stand while restricting its meaning. *Stern*, *supra* note 148, at 106. Nevertheless, the same general principles govern both inquiries. See *id.* at 82-83; see also *Wyoming v. Oklahoma*, 502 U.S. 437, 460-61 (1992) (acknowledging the possibility that "if application of a statute to some

applied to negligent patent infringements ordinarily would not render the remainder of the statute invalid unless the Court found that application to be nonseverable.¹⁷⁰ Nevertheless, the *Florida Prepaid* Court did not consider the severability question.¹⁷¹

More generally, the logic of the section 5 overbreadth approach by definition omits analysis of severability. The approach developed in the *City of Boerne* cases focuses on the ratio of a challenged statute's illegitimate sweep to the number of affected state actions that have a significant likelihood of being unconstitutional.¹⁷² Under this approach, the existence of a sufficient number of invalid applications renders the remaining provisions invalid.¹⁷³ Inherently, this approach conflicts with the Court's ordinary principles of severability, under which the existence of unconstitutional applications would only require invalidation of the entire statute if those applications could not be severed from the remainder of the statute.

In this respect, the *City of Boerne* cases depart even further from the traditional severability analysis than the First Amendment overbreadth standard. Although the practice of invalidating a statute because it may burden protected expression in circumstances not before

classes is found unconstitutional, severance of those classes permits application to the acceptable classes"). Professor Fallon has described the separable applications of a statute as "subrules" which are amenable to severing in the same way as distinct statutory provisions. See Fallon, *supra* note 10, at 1333-34. The caveat on the problem of separable applications is that "any separation of a statute through its specification into subrules must not cross the vague line that divides judicial interpretation from judicial legislation." *Id.* at 1333; see also Stern, *supra* note 148, at 85. Accordingly, a court considering whether to sever different applications of the same statutory language should observe the same principles governing the imposition of any limiting construction, namely that the statute must be "readily susceptible" to such a construction. Fallon, *supra* note 10, at 1333; see also *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (analyzing the severability of statutory applications in light of the rule that a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction").

170. See *Alaska Airlines*, 480 U.S. at 680; see also Fallon, *supra* note 10, at 1349 ("In cases involving federal statutes, the Supreme Court typically assumes that invalid subrules should be treated as separable from valid ones when Congress would presumably have wanted that result and a court can identify lines of severance that are consistent with a statute's structure and purpose.").

171. See 527 U.S. 627 (1999). In contrast to the Supreme Court's approach, the district court that considered the validity of the abrogation of sovereign immunity in the Americans with Disabilities Act in *Kilcullen v. New York State Department of Transportation* adhered to ordinary principles of severability. 33 F. Supp. 2d 133, 144 (N.D.N.Y. 1999). As has been noted, see *supra* notes 1-6 and accompanying text, the plaintiff's claim in that case did not implicate the reasonable accommodation requirement of the ADA. *Id.* at 144. Nevertheless, the court concluded that the constitutionality of the statute as a whole depended on the validity of that requirement because it could not be severed from the rest of the statute. *Id.* (noting that "the aspect on which [the plaintiff rested] his claim ha[d] no separate textual manifestation from the accommodation requirement").

172. See *supra* Section I.A.

173. See *supra* Section I.A.

the Court is also in tension with the principle of severability,¹⁷⁴ even in the First Amendment context the Court generally entertains the possibility of imposing a limiting construction before invalidating a statute as facially overbroad.¹⁷⁵ Accordingly, the collision between the section 5 overbreadth approach and principles of severability cannot be defended by analogy to the First Amendment overbreadth doctrine.

C. *Internal Inconsistencies in the City of Boerne Cases*

A final cause for concern in evaluating the Court's new section 5 overbreadth approach arises from an apparent inconsistency between the method of adjudication in the *City of Boerne* cases and the substantive rules of constitutional law those cases announced. In each of those cases, the Court reaffirmed the substantive maxim that Congress may prohibit state action that is not itself unconstitutional as a means of preventing or remedying state action that does violate the Constitution.¹⁷⁶ Accordingly, a statute that affects both constitutional and unconstitutional state action may be permissible, so long as the resulting constraint on permissible state conduct provides a congruent and proportional remedy or deterrent to actual violations of the Fourteenth Amendment.¹⁷⁷ By its terms, this substantive standard does not require a threshold amount of unconstitutional state action to be prohibited by the statute relative to the amount of affected permissible conduct.¹⁷⁸ Impliedly, then, a prophylactic statute that was carefully tailored to provide a congruent and proportional remedy to a core constitutional violation would be an appropriate exercise of Congress's power to enforce the Fourteenth Amendment, even if that constitutional violation occurred only sporadically.

174. Professor Fallon has noted the inherent conflict between severability and the First Amendment overbreadth doctrine. Fallon, *supra* note 10, at 1355 (noting that overbreadth doctrine "limit[s] the severability of statutes that, as relatively fully specified, include some identified quantity or proportion of invalid subrules or applications").

175. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 882-85 (1997) (considering whether the Communications Decency Act was susceptible to severing or narrow construction before invalidating the Act); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

176. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("Congress[s] power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997))).

177. *City of Boerne*, 521 U.S. at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.").

178. *Id.*

The procedural steps the *City of Boerne* cases have followed dictate a different outcome than these substantive standards would suggest. As has been noted, these cases evaluate the congruence and proportionality of prophylactic legislation by asking whether “many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”¹⁷⁹ As such, the boundary separating statutory restraints on permissible state conduct that satisfy the congruence and proportionality standard from those that do not is defined by reference to the magnitude of the core constitutional violation addressed by the legislation. Although the substantive principles are ambivalent on this point, the overbreadth approach requires “many” unconstitutional state actions as a prerequisite to section 5 legislation.¹⁸⁰ Moreover, as is inherent in the overbreadth approach, the magnitude of the constitutional problem is also assessed in relative terms: section 5 legislation is invalid if the Court identifies an unfavorable ratio of legitimate to illegitimate applications.¹⁸¹ In other words, although the substantive principles do not appear to attach any significance to this ratio, the procedural method of adjudication requires assessment of the amount of affected state action that is likely to be unconstitutional relative to the amount of affected state action that is not unconstitutional.¹⁸² It is the procedural approach, not the substantive standards, that has determined the outcomes in these cases.¹⁸³

This seemingly pedantic inconsistency between substance and procedure has significant ramifications for the respective roles of Congress and the courts in the interpretation and enforcement of the Fourteenth Amendment. By using an overbreadth rule to test a statute’s congruence and proportionality, the procedural approach penalizes statutes that enforce the Fourteenth Amendment against a problem that the Court finds to be too small to justify any prophylactic

179. *Id.* at 532; see *supra* notes 63-66 and accompanying text.

180. See *supra* notes 63-66 and accompanying text. That the method of adjudication drives the outcome in these cases is problematic in part because it incorporates this indeterminate requirement that “many” affected state actions have a significant likelihood of being unconstitutional, *City of Boerne*, 521 U.S. at 532, without offering any guidance as to what will meet this threshold. *United States v. Morrison* illustrates the difficulty this produces. Compare *Morrison*, 529 U.S. 598, 626 (2000) (“[T]he problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States.”), with *Morrison*, 529 U.S. at 666 (Breyer, J., dissenting) (“This Court has not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution.”).

181. Cf. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (explaining that overbreadth doctrine requires a burden on a “substantial” amount of protected expression “judged in relation to the statute’s plainly legitimate sweep”).

182. See *supra* notes 63-77 and accompanying text.

183. See *supra* notes 63-77 and accompanying text.

response.¹⁸⁴ As such, it negates the substantive principle that “[i]t is for Congress in the first instance to ‘determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.’”¹⁸⁵ Despite this substantive deference to legislative policy choices, the overbreadth approach requires the Court to make its own determination as to whether remedial legislation is truly necessary, or whether a statute is instead “an unwarranted response to a perhaps inconsequential problem.”¹⁸⁶

D. *The Federalism Defense of Section Five Overbreadth*

When the Supreme Court altered its traditional rules of constitutional adjudication in the special context of the First Amendment, it did so only after concluding that weighty considerations warranted an exception.¹⁸⁷ Although the development of the First Amendment overbreadth approach clashed with ordinary rules of standing and principles of judicial review, the Court concluded that “the sensitive nature of protected expression” necessitated a departure from these ordinary rules because “persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.”¹⁸⁸ By contrast, when *City of Boerne* and subsequent decisions examining legislation under Congress’s power to enforce the Fourteenth Amendment adopted a method of adjudication that is closely akin to the First Amendment overbreadth doctrine, the Court neither acknowledged the development nor discussed whether any considerations justify its use in the Fourteenth Amendment context.¹⁸⁹

Were it to address the appropriateness of the section 5 overbreadth approach, the Court likely would consider a defense rooted in the protection of federalism and states’ rights. In several doctrinal areas, the Supreme Court has demonstrated a renewed sensitivity to the importance of federalism in the constitutional structure.¹⁹⁰ Such

184. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001) (“[T]hese incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”).

185. *City of Boerne*, 521 U.S. at 536 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

186. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000).

187. See, e.g., *New York v. Ferber*, 458 U.S. 747, 768-69 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973); see also *supra* notes 143-145 and accompanying text.

188. *Ferber*, 458 U.S. at 768 (internal quotation marks and citation omitted); see also *Broadrick*, 413 U.S. at 611 (“It has long been recognized that the First Amendment needs breathing space. . .”).

189. See *supra* note 20 and accompanying text.

190. For example, the Court has interpreted the Tenth Amendment to prohibit Congress from conscripting the regulatory channels of state governments into the enforce-

sensitivity may warrant the use of exceptional rules of adjudication when necessary to prevent federal encroachment into prerogatives traditionally reserved to the states.¹⁹¹ Just as the overbreadth doctrine developed in the First Amendment context in recognition of the paramount importance of expressive rights, so might it be applied in the section 5 context in light of the important constitutional values of federalism and state sovereignty.

This federalism justification for extending the overbreadth doctrine for the benefit of states is perplexing, however, in the context of the Fourteenth Amendment, which effected a significant shift in the federal-state balance¹⁹² and which sanctioned intrusions by Congress into “spheres of autonomy previously reserved to the States.”¹⁹³ As Justice Breyer has noted, rules for interpreting section 5 “that would provide States with special protection . . . run counter to the very object of the Fourteenth Amendment.”¹⁹⁴ In light of the substantial “federalism costs” contemplated by the Reconstruction Amendments,¹⁹⁵ it makes little sense to adjudicate challenges under those amendments in a manner that is overly solicitous of states’ rights.

Moreover, transporting a rule of adjudication from the First Amendment context to the federalism context implies a dubious analogy between the nature of individual rights and states’ rights and the mechanisms by which those rights ought to be preserved.¹⁹⁶ There

ment of federal law. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Moreover, the Court has protected the reserved powers of the states by closely policing the limits on Congress’s delegated powers. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). The Court has also protected the dignity and effective function of states by interpreting the Eleventh Amendment as confirmation of the background principle of sovereign immunity. See *Fed. Mar. Comm. v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). These lines of cases reflect the perceived value of the states within the Constitution’s federal structure. See generally THE FEDERALIST NOS. 39, 45, 46, 51 (Jacob E. Cooke ed., 1961); WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (1964); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, J. ECON. PERSP. Fall 1997, at 43; Gary Lawson & Patricia B. Granger, *The ‘Proper’ Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

191. Cf. William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992) (describing the development of the clear statement rule in sovereign immunity cases as a procedural mechanism adopted for the protection of states).

192. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

193. *Id.*

194. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 388 (2001) (Breyer, J., dissenting).

195. *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999).

196. Although an extended discussion of the nature of rights is beyond the scope of this Note, it is worth noting that the overbreadth doctrine is commonly perceived as a resolution to the conflict between the presumptive bar against facial challenges and the “valid rule

is no obvious chilling effect on the ability or willingness of state actors to challenge federal legislation.¹⁹⁷ On the contrary, at least in the case of federal legislation abrogating state sovereign immunity, no action adverse to state interests can occur except in the course of litigation, which necessarily creates an opportunity for the defendant state to challenge the constitutionality of the abrogation. Nor has the Court advanced any reason why the state actions at issue in the section 5 cases require any special "breathing space,"¹⁹⁸ as the Court found to be the case with individual First Amendment rights.¹⁹⁹ Given this incongruity between individual expressive rights and the right of states to be free from overreaching by the federal government, the federalism defense for the creation of section 5 overbreadth appears tenuous at best.

requirement," which holds that every individual has a personal right not to be sanctioned under an invalid rule of law, even where the law's invalidity arises only with respect to other individuals. See, e.g., Fallon, *supra* note 10, at 1331 (discussing the conflict between the as-applied rule of *United States v. Raines* and Professor Monaghan's valid rule requirement) (citing Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3); Isserles, *supra* note 10, at 388-91 (discussing Professor Monaghan's defense of the overbreadth doctrine as a necessary outgrowth of the valid rule requirement). But see Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) (same); Adler, *supra* note 10, at 1395-406 (questioning the correctness of the valid rule principle). Whatever similarity may exist between states' "rights" and individual "rights," it is not at all obvious that states should be equally entitled to the benefit of the valid rule principle. A closely related debate concerns the question of whether courts should enforce structural principles such as federalism using the same mechanisms it uses to protect individual rights, or whether those principles should be left to the protection of the political process. See generally JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997). One need not favor total judicial abdication of any role in the protection of states' rights to allow for the possibility that the nature of those rights may be sufficiently different from the individual rights enshrined in the First Amendment such that the use of precisely the same methods of protection may not be appropriate.

197. See *supra* notes 143-145 and accompanying text.

198. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

199. Indeed, for the Court to conclude that these state actions required special "breathing space" would directly contradict Congress's policy judgment that the state actions in question infringed on individual civil rights, arguably in violation of the Fourteenth Amendment.

III. THE FUTURE OF SECTION FIVE: FACIAL INVALIDATION OF TITLE VII?

A hypothetical case involving Title VII of the Civil Rights Act²⁰⁰ demonstrates that the Court's new section 5 overbreadth approach leads to different — and troubling — substantive outcomes. Under Title VII, individuals may sue their state employers for discriminating on the basis of race, color, religion, sex, or national origin.²⁰¹ Consider the case of an Asian-American woman who is terminated from her position as a professor at a state university.²⁰² Suppose she sues her former employer, alleging that the state violated Title VII by discharging her because of her race and gender. In defense, the state argues that sovereign immunity bars the plaintiff's claim. As Congress may only abrogate a state's sovereign immunity pursuant to section 5 of the Fourteenth Amendment, the court must consider the validity of Title VII as an exercise of Congress's power under section 5 to enforce the Equal Protection Clause.²⁰³

Under the traditional approach to constitutional adjudication, the court would analyze this issue only by reference to the facts and scope of the immediate case.²⁰⁴ Following *United States v. Raines*,²⁰⁵ if the application of Title VII in the plaintiff's case was clearly constitutional under the Fourteenth Amendment, that "should [be] an end to the question of constitutionality."²⁰⁶ Accordingly, the validity of Title VII

200. 42 U.S.C. § 2000e (1994); see *supra* notes 23-28 and accompanying text.

201. 42 U.S.C. § 2000e-2. As has been noted, the Supreme Court held in *Fitzpatrick v. Bitzer* that the 1972 amendments to Title VII constituted an abrogation of state immunity from suit under Title VII. 427 U.S. 445 (1976); see *supra* note 23.

202. This hypothetical is loosely based on the facts of *Nanda v. Board of Trustees of the University of Illinois*, 219 F. Supp. 2d 911 (N.D. Ill. 2001). The validity of Title VII as an exercise of Congress's section 5 power has also been considered in several other lower federal court decisions. See *supra* note 23.

203. The *Fitzpatrick* Court held that Title VII effectively abrogated state sovereign immunity, but because the parties to that case did not dispute its constitutionality, the Court did not squarely decide the validity of the abrogation under section 5. See 427 U.S. at 456 n.11. Lower courts that have relied on *Fitzpatrick* in Title VII suits have acknowledged that *Fitzpatrick* may not be controlling in light of subsequent cases. See, e.g., *Okruhlik v. Univ. of Ark.*, 255 F. 3d 615, 622 (8th Cir. 2001); *In re Employment Discrimination Litig. Against Ala.*, 198 F.3d 1305, 1317 (11th Cir. 1999); *Nanda*, 219 F. Supp. 2d at 913-14; *Okokuro v. Pennsylvania Dep't of Welfare*, No. 00-2044, 2000 U.S. Dist. LEXIS 15699, at *10 n.4 (E.D. Pa. Oct. 31, 2000). These courts' reliance on *Fitzpatrick* stems from the rule that it is the responsibility of the Supreme Court, not the lower courts, to clarify the law in this area. See *Okruhlik*, 255 F.3d at 622 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)); *In re Employment Litig.*, 198 F.3d at 1317 (same); *Nanda*, 219 F. Supp. 2d at 913-14 (same); *Okokuro*, 2000 U.S. Dist. LEXIS 15699, at *10 n.4 (same). In this hypothetical, therefore, the Supreme Court would be free to consider anew whether Title VII is valid under section 5.

204. See *supra* Section I.B.

205. 362 U.S. 17 (1960).

206. *Raines*, 362 U.S. at 24-25. As noted above, *Raines* governed section 5 cases prior to *City of Boerne*. See *supra* Section I.B.

— and of the plaintiff's suit — would depend only on whether it is appropriate under section 5 for Congress to expose states to suit for damages when they intentionally discriminate on the basis of race or gender. As the Fourteenth Amendment itself prohibits such discrimination, the remedy provided in Title VII is perfectly congruent to the constitutional violation to be prevented.²⁰⁷ Under the traditional approach, the court would not consider Title VII on its face unless the state defendant could demonstrate that “no set of circumstances exists under which the Act would be valid.”²⁰⁸ Having found that application of Title VII to intentional discrimination that violates the Equal Protection Clause is appropriate under section 5, the court would not entertain the state's facial challenge.²⁰⁹ Under this traditional approach, then, the abrogation of state immunity in Title VII would be valid under section 5, and the plaintiff's suit could proceed.

The Supreme Court's new section 5 overbreadth approach leads to a dramatically different result. Following the *City of Boerne* cases, a court would measure Title VII as a whole against the relevant equal protection standard.²¹⁰ If the statute deviated from that standard to such an extent that it would prohibit constitutional state action in hypothetical circumstances, the Act would be invalid unless the court determined that the Act affects “many” state actions that have a significant likelihood of being unconstitutional, judged in relation to its illegitimate sweep.²¹¹

Among the potential applications that would fall within the court's scrutiny under this approach would be Title VII's prohibition of

207. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.”). Intentional discrimination on the basis of race, though not per se a violation of the Fourteenth Amendment, is only permissible in the rare circumstance that it is narrowly tailored to achieve a compelling government interest. *Adarand v. Peña*, 515 U.S. 200, 227 (1995). Similarly, intentional discrimination on the basis of gender is impermissible unless a state demonstrates that it is substantially related to the achievement of important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). For this reason, courts and commentators have often described the requirements of Title VII and the Equal Protection Clause as coextensive with respect to intentional discrimination. See, e.g., *Okruhlik*, 255 F.3d at 626 (“[T]he elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution.”); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1196 (1996) (describing equal protection and Title VII claims as “perfectly parallel”), *disapproved on other grounds by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Cross v. Alabama Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1508 (11th Cir. 1995) (describing Title VII and the Equal Protection Clause as “parallel remed[ies]”); *Juliano*, *supra* note 25, at 1112.

208. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

209. Even if the Court considered other applications of the Act, these would bear on the plaintiff's case only in the event that these applications were found to be inseverable from the rest of the Act. See *supra* Section II.B.

210. See *supra* Section I.A.

211. See *supra* Section I.A.

neutral employment practices that produce a disparate impact on the basis of race or gender.²¹² The Fourteenth Amendment itself does not prohibit facially neutral state action that produces a disparate impact in the absence of a discriminatory purpose.²¹³ Moreover, the Supreme Court has cautioned that “[a]lthough disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny.”²¹⁴ By deviating from these constitutional standards, the disparate impact provisions of Title VII prohibit a great deal of state action that is not itself unconstitutional. As a result, the abrogation of immunity in the plaintiff’s case would be invalid unless the court was satisfied that this broad sweep was justified by the existence of a sufficient number of applications to state action that in fact violated the Fourteenth Amendment. If the court concluded that this threshold had not been met, Title VII as a whole — including the abrogation of state immunity for intentional discrimination — would not be a valid exercise of Congress’s power under section 5. Even though the plaintiff alleged only intentional discrimination, the state university’s sovereign immunity would preclude the plaintiff from pursuing any remedy.

As this hypothetical demonstrates, application of the section 5 overbreadth approach may yield a completely different result in a given case than the traditional approach to constitutional adjudication. The Supreme Court’s recent willingness to invalidate statutes on the basis of problematic hypothetical applications threatens even those applications of federal statutes that do not raise any constitutional difficulties in and of themselves. In addition to Title VII, this approach may endanger other federal civil rights statutes, particularly section 2 of the Voting Rights Act.²¹⁵ In this manner, the Court’s choice of pro-

212. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); see also *supra* note 27.

213. See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 272, 279 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976).

214. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001) (internal citation omitted).

215. 42 U.S.C. § 1973 (2002). After the Supreme Court ruled in *Mobile v. Bolden* that a state’s discriminatory purpose was a necessary element of a claim of vote dilution under both the Constitution and the Voting Rights Act, 446 U.S. 55 (1980), Congress amended the Voting Rights Act to provide that a plaintiff could raise a claim of vote dilution under section 2 without showing discriminatory purpose. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 (1982). See generally SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 710-45 (2d ed. 2001). Although the Supreme Court issued a summary affirmance of the amended section 2 in 1984, see *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984), current members of the Court have more recently indicated their belief that the constitutionality of section 2 of the Voting Rights Act remains an open question. See, e.g., *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O’Connor, J., concurring); *Johnson v. DeGrandy*, 512 U.S. 997, 1028-29 (1994) (Kennedy, J., concurring). In the wake of *City of Boerne*, several commenta-

cedural approach may exert a dispositive effect on substantive outcomes.

CONCLUSION

This Note argues that the Supreme Court has developed a new approach to adjudicating challenges to federal legislation under section 5. This approach imports the concept of overbreadth from First Amendment doctrine into the Fourteenth Amendment context by measuring the text and legislative findings of federal statutes directly against the relevant constitutional standard, without regard to the specific facts of the case before the Court. Under this approach, the Court has replaced the standard of *United States v. Salerno* with the standard of *Broadrick v. Oklahoma*, invalidating federal legislation on the basis of an unfavorable ratio of the number of valid applications — in which “many” affected state actions have a significant likelihood of being unconstitutional — to the number of invalid applications, just as the First Amendment overbreadth doctrine turns on the ratio of a statute’s “legitimate sweep” to the magnitude of the burden it imposes on protected expression.

As this Note has demonstrated, the development of the Court’s new overbreadth approach to challenges under section 5 raises a number of concerns. It conflicts with settled principles of severability and judicial review while creating an internal inconsistency within the substantive law governing section 5. Although a federalism-based argument may offer some justification for this approach, these difficulties appear, at first blush, to outweigh the federalism considerations. At the same time, the adoption of this overbreadth approach has largely determined the substantive outcomes in the *City of Boerne* cases and promises to do so in future cases. As such, the Court would do well to address this issue more explicitly and to reflect more carefully upon the wisdom of this method of constitutional adjudication.

tors have argued that section 2 is unconstitutional insofar as it prohibits state electoral systems that result in vote dilution even in the absence of discriminatory purpose. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1737 (2001); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749-52 (1998). But see Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 728-29 (1998). See generally ISSACHAROFF ET AL., *supra* at 859-66. As with Title VII, the Court’s new section 5 overbreadth approach threatens the viability of section 2 of the Voting Rights Act because the existence of these problematic applications may result in facial invalidation even in a case alleging only intentional vote dilution.